Belle of Sioux City, L.P. *and* Workers Have Rights Too (Fair Deal Unit). Case 18–CA–14633

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On April 12, 1999, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Belle of Sioux City, L.P., Sioux City, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

David M. Biggar, for the Acting General Counsel.
Anthony B. Byergo (Seyfarth, Shaw, Fairweather & Geraldson), of Chicago, Illinois, for the Respondent.
Richard Sturgeon, of Sioux City, Iowa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case[1] in Sioux City, Iowa, on July 14 through 17, and on August 11 and 12, 1998. On May 13, 1998, the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing, based on an unfair labor practice charge filed on November 17[2] and amended on December 11, 1997, and on April 27, 1998, alleging violations of Section 8(a)(1) and (4) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. INTRODUCTION

This case presents issues arising from events which occurred on a boat docked in the Missouri River at Sioux City, Iowa. Gambling and restaurant operations are conducted on that boat which is owned and operated by Belle of Sioux City, L.P. (the Respondent). It admits that, at all times material to the allegations in this proceeding, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, based upon the admitted facts that during calendar year 1997 it derived gross revenues in excess of $500,000, performed services valued in excess of $50,000 in States other than Iowa, and purchased goods valued in excess of $50,000 which it received at Sioux City directly from points outside of the State of Iowa. Not clear from the evidence is Respondent's exact relationship to another firm: Argosy, Incorporated located in Alton, Illinois. What does seem clear is that the latter has ultimate control over Respondent and its operations. Moreover, at least one of Respondent's officials attributed at least one allegedly unlawful decision to Argosy, International officials.

As must be implicit from what has been said in the preceding paragraph, a casino is operated on Respondent's boat. The two departments most directly involved in those operations are the slots department, not involved in this proceeding, and the table games department, whose employees are alleged to have been the target of unfair labor practices. Respondent's casino manager estimated that between 95 and 100 employees were employed in the table games department at the time of the hearing.

Personnel from four other departments became directly involved in at least some of the events at issue. One is the human resources department which, as might be expected, is involved in personnel matters and maintains personnel records. A second is the guest services department which operates the gift shop and players club, as well as being in charge of supplying uniforms to employees, at least during October. The third is the security department which conducts internal investigations of such matters as equal employment opportunity (EEO) complaints and which attempts to ensure safety on the boat of patrons and employees, as well as of Respondent's assets.

In light of the events brought into issue by the complaint, as amended, the fourth department, and its director, is the most important of the four other departments. That is the surveillance department. Its function is, through cameras and patrols through the casino, to maintain ongoing surveillance of the games, the patrons and the employees, principally to ensure that no cheating takes place. Its director testified that the surveillance department is a "separate entity from" Respondent and

[1] The Respondent excepts to the judge's failure to dismiss the 8(a)(1) complaint allegation regarding Supervisor Beth Poss on the theory that the General Counsel had inappropriate contact with Poss without the presence or permission of counsel for the Respondent. Inasmuch as the judge dismissed this complaint allegation on the merits, and neither the General Counsel nor the Charging Party have excepted to the dismissal, we find it unnecessary to pass on the Respondent's contention that the General Counsel acted improperly.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[1] As amended at the hearing.

[2] Unless stated otherwise, all dates occurred during 1997.

that he "report[s] directly to corporate," that is, "The corporate offices. Argosy, Incorporated offices." As he further testified, "we report to separate—separate people. I report directly to corporate, indirectly to the general manager" of Respondent.

At all material times, that general manager has been John Pavone. He testified that he is one of "only two people in our company that can actually authorize the termination of an employee," the other being the director of human resources. Until December that had been Kathy Allan; thereafter it has been Barbara Holsinger. Below Pavone, at all material times, has been Casino Manager Gordon Greco. Below him are, at least, two levels of supervision: shift managers, such as Brad Ebaugh and Pat Sprague, and floor supervisors. It is admitted that at all material times Pavone, Greco, Holsinger, and Ebaugh had been statutory supervisors and agents of Respondent. So, also, is it admitted that Allan had been a statutory supervisor and agent of Respondent, but only until her employment with it ended at the end of November.

With regard to the above-enumerated four other departments, Lisa McVay[3] had been guest services manager during, at least, October and early November and, while serving in that capacity, had been an admitted statutory supervisor and agent of Respondent. Since July Dave Brown has been director of security, also an admitted statutory supervisor and agent of Respondent. Not alleged in the complaint as a statutory supervisor or agent is Mike Galle who has been director of surveillance since approximately 1995. Thus, no opportunity was afforded Respondent to admit or deny his supervisory or agency status. Even so, given the personnel under him in his department and, more importantly, the role which he played in some of the allegedly unlawful personnel actions discussed in succeeding sections, it seems indisputable that at all material times Galle had been, at least, an agent of Respondent within the meaning of Section 2(13) of the Act.

As to those allegedly unlawful acts, no union has been directly involved in the sequence of events underlying them. Instead, this is a situation where employees assertedly initiated communications among themselves about certain perceived unsatisfactory working conditions—principally, perceived ill-treatment of them by Casino Manager Greco—and thereafter went directly to Respondent about it and, also, contacted an outside workers rights organization for assistance. Respondent argues that at least these initial employee actions had not been concerted, within the meaning of Section 7 of the Act, but as concluded in section II, infra, Respondent's actions had been aimed at employee activity which was both concerted and protected by Section 7 of the Act.

When he was approached directly by one employee about her individual situation and, more significantly, when it was disclosed that that employee had been communicating with some of her coworkers about it, Greco became angered. He made certain statements to three employees, overheard by whomever happened to be working in the casino at the time, which are alleged to have constituted unlawfully coercive interrogation and unlawful threats of retaliation for the employees' activity, in violation of Section 8(a)(1) of the Act. As discussed in section II, infra, a preponderance of the credible evidence supports those allegations.

It also is alleged that because of those communications among employees about their working conditions, Respondent took the added retaliatory action of issuing two written warnings to one of those employees, dealer Michelle Case, on September 9. A preponderance of the credible evidence does establish that both written warnings had been intended to interfere with, restrain, and coerce Case in the exercise of her statutorily-protected rights, in violation of Section 8(a)(1) of the Act, as concluded in section III, infra.

Discussed in section IV, infra, is the fact that, in addition to having contacted the workers rights organization, Case and another dealer, Marla Soole, filed internal EEO complaints against Greco because of his assertedly abusive treatment of employees. The investigation of that complaint was conducted by then-Director of Human Resources Allan and Director of Security Brown. It is uncontroverted that the latter's position, under Respondent's EEO-investigation procedure, ordinarily was involved in such investigations. So, his participation in the investigation of Case's and Soole's complaints is not extraordinary. In the course of conducting that investigation, Allan and Brown interviewed a number of employees other than Case and Soole.

Their investigation yielded no evidence, in Respondent's opinion, of employment harassment by Greco against a protected class of employees. But, that is not the point of the allegation made in connection with that investigation. Rather, it is alleged that, during it, they had unlawfully threatened employees, by warning that discipline would be imposed if employees discussed with coworkers their participation in Respondent's EEO investigation. As concluded in section IV, infra, the credible evidence establishes that there was legitimate reason for what Allan and Brown had said in that regard and, moreover, that there is no credible evidence showing that anything had been said to employees beyond what was necessary to further that legitimate purpose. Thus, there was no violation of Section 8(a)(1) of the Act in that respect and I shall dismiss the allegation.

An added allegedly unlawful statement was that Shift Security Supervisor Beth Poss, an admitted statutory supervisor and agent of Respondent, had told employees they should watch their backs because Greco was watching surveillance tapes of employees. In consequence, it is argued, Poss had threatened unspecified reprisals against those employees. A sometime acrimonious exchange between counsel arose in connection with this allegation. Essentially, it was argued that, in addition to being one which was barred by the limitations period in Section 10(b) of the Act, the allegation was tainted by prosecutorial misconduct which should bar any violation which might otherwise be predicated upon it. As concluded in section V,B, infra, that is not an issue for resolution in this proceeding. In any event, however, the credible testimony about what Poss had said does not support a conclusion that her remarks had interfered with, restrained or coerced employees in the exercise of rights enumerated in Section 7 of the Act.

Most of section V, infra, involves a series of disciplinary actions directed against Soole: a 3-day suspension from Septem-

[3] Spelled apparently incorrectly in the complaint as "McVeigh."

ber 24 through 26; another 3-day suspension from November 4 through 6; a discharge on November 11, accompanied by barring her from Respondent's premises for 1 year, which was rescinded on the next day; and, another discharge and accompanying 1-year bar imposed on December 10. Each of those disciplinary actions is alleged to have been motivated by retaliation against Soole for her activities protected by Section 7 of the Act and to discourage employees, including Soole with regard to the suspensions, from continuing to communicate among themselves and with outsiders about their working conditions. Soole's December discharge and bar from the premises is additionally alleged to have resulted from the filing of the charge in the instant matter and, accordingly, to have violated Section 8(a)(4) of the Act. The evidence supports those allegations that Section 8(a)(1) was violated with regard to the suspensions and discharges and bars of Soole. But, it does not establish a violation of Section 8(a)(4) of the Act with regard to the December discharge and bar.

A second employee, Marilyn Raymond, also is involved in that particular incident. She received a 3-day suspension in connection with the incident that led to Soole's December 10 discharge and 1-year bar from the premises. The General Counsel alleges that Raymond had been suspended to disguise the unlawful motivation for those personnel actions directed against Soole. Thus, it is alleged that Raymond's suspension also had violated Section 8(a)(1) and (4) of the Act. I conclude that Raymond was suspended to conceal Respondent's unlawful motive for terminating and barring Soole on December 10. Based on that penultimate conclusion, I conclude that Raymond's suspension violated Section 8(a)(1) of the Act and, for the reasons discussed in section V,E, below, that Raymond's suspension also violated Section 8(a)(4), of the Act.

At this point one general observation should be made about the testimony. As they testified, it was my impression that several of the witnesses were being less than candid: Soole, Pavone, Greco, and Galle being most prominent in that respect. A review of the record of their testimonies, as well as certain other evidence, serves to illustrate their lack of candor, as will be described throughout the ensuing sections. I place no reliance of any of their accounts, save to the extent that particular ones are supported by credible corroborating testimony, by objective considerations or by probabilities arising from reliable evidence.

Effectively, that conclusion leaves Respondent without credible evidence to support its defenses. In fact, I do conclude that all of those adverse personnel actions had violated Section 8(a)(1) of the Act. Yet, before moving on, some discussion should be directed to the methodology for analyzing these types of allegations—retaliation against employees for engaging in activities protected by Section 7 of the Act and, as well, efforts to discourage employees from engaging in such activities.

In, at least, *Waste Stream Management*, 315 NLRB 1099 (1994), the Board stated that the methodology of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), does not apply to allegations of discipline, such as discharge, based on Section 8(a)(1) of the Act: "Instead, the legal question presented is whether Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their rights under Section 7 of the Act." (315 NLRB at 1099–1100.) The Board based its unlawful discharge and route redistribution conclusions in that case upon the twofold penultimate conclusions that "employees would tend to view the discharge and route redistribution action as an attempt [ultimately] . . . to dissuade employees from supporting the Union," and "Respondent has not proved a legitimate and substantial business justification for its conduct."

So far as it goes, that methodology would appear unremarkable when applied to situations where allegedly unlawful personnel action results from purported employee misconduct while engaging in activities protected by the Act, e.g., *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964), and, as well, where employer actions invade employee rights to an extent that outweigh whatever business ends an employees claims to be trying to accomplish. See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Indeed, it does address the situation presented by the warning notices issued to Case on September 9, as discussed in section III, infra.

It is not applicable, however, to the allegedly unlawful disciplinary actions taken against Soole and Raymond. With regard to those allegations, the ultimate determination is whether or not Respondent had actually been motivated by employees' activity, not involving a union, but nonetheless protected by Section 7 of the Act. Such a determination is not one of discrimination, as was claimed in *Waste Stream Management,* supra, but rather is a determination of motivation: "The state of mind of the company officials who made the decision," *Abilene Sheet Metal Inc. v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980), and, thus, of "the actual motive" for allegedly unlawful adverse personnel actions. *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). Indeed, that is the very point of the analytical methodology set out in *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 88 (2d Cir. 1990): "A violation of [Section] 8(a)(1) is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was 'protected' by the [A]ct; and (4) the discharge or other adverse personnel action *was motivated by the protected activity*." (Citation omitted; emphasis added.)

In situations such as that presented here with respect to the disciplinary actions directed to Soole and to Raymond, Respondent's actual motive is as much an the objective of analysis as would be the fact were it alleged that Respondent had been motivated by union activities and support, under Section 8(a)(3) of the Act. In both, the ultimate issue is motivation. In both, analytical methodology aims at determining that motivation, though in one the ultimate determination is whether or not there has been discrimination, while in the other the ultimate determination is whether or not there has been interference, restraint, or coercion. As it turns out here, the difference between methodologies may not be significant, inasmuch as Respondent's testimony, in support of its advanced legitimate defense, is not credible. Nonetheless, analysis in section V, infra, will proceed with initial consideration of the General Counsel's showing that animus toward known or suspected concerted, protected activity by Soole had been a motivation for suspending her twice and, then, for discharging her twice, consistent with the meth-

odology of *Wright Line,* supra, as modified in *Rose Hills Co.*, 324 NLRB 406 fn. 6 (1997).

II. ALLEGED UNLAWFUL INTERROGATION AND THREATS BY GREDO

A. Events of September 1 Through 4

The origin of what became the events at issue in this proceeding was the scheduling of dealers Deborah Marshall and Floyd Woods to work on Labor Day, September 1. That was not one of Marshall's normally scheduled workdays. She had told the other employer for whom she worked that she would not be reporting for her other job on September 1.

As it turned out, by the time that she and Woods reported on Labor Day, Respondent had determined that business would not be so great as had been anticipated and, accordingly, that one of those two dealers would not be needed. Table Games Shift Manager Pat Sprague asked if one of the two dealers was willing to go home for the day. Neither was willing to volunteer. Sprague than said that a choice would have to be made by resorting to chance, such as by drawing for it. At that point Marshall, disgusted at the situation, said that she would leave.

On September 4 Marshall questioned Casino Manager Greco about whether an employee scheduled for work could be sent home for lack of expected business. Had there been no more to the overall sequence of events than the foregoing description, then there would not likely be any basis for concluding that Marshall's question, and implicit complaint, to Greco had been concerted activity within the meaning of Section 7 of the Act. For her conduct could be regarded as no more than "purely personal 'griping.'" *NLRB v. City Disposal Systems,* 465 U.S. 822, 833 fn. 10 (1984). However, additional events had occurred between September 2 and 4 before Marshall approached Greco.

Marshall testified that, during her breaks on September 2 and 3, and perhaps during those early on September 4, she had discussed with coworkers not being able to work on, and not being paid for, September 1, after having been scheduled to work that day. As having been present during those discussions, Marshall was able to identify dealers Joyce Gantz and Michelle Case. In fact, both Gantz and Case testified that Marshall had told them about the Labor Day incident. In addition, dealer Marla Soole testified that she had been told by Marshall about what had occurred during Labor Day.

Soole testified that, in addition, other employees had been present in the break room when Marshall had been talking about the Labor Day incident. So, too, did Gantz: "There were several of us down there," and, "Just whoever was on break at the time was down there." Beyond that, Case testified that there had been additional discussions of that incident among employees, even when Marshall may not have been present. Although Case was unable to recall the names of any of those other employees, two objective facts lend support to her testimony about such discussions. First, dealers at Respondent are given 20-minute breaks periodically throughout their workdays and, when taking them, must go to the lower deck breakroom, though smokers can go to a particular deck area to have a cigarette. Thus, more than might be the fact at other workplaces, Respondent's casino employees, particularly dealers, come into contact with each other during the workday on a regular basis.

Second, at least during late 1997, Respondent viewed as troublesome some of the communications among its employees. Thus, Casino Manager Greco complained about the boat being "a rumor factor" and of the "rumors, rumors, rumors, rumors" that were going around. So, also, did Table Games Shift Manager Ebaugh: "That's what the boat is. It's a rumor factory." Obviously, the subjects of those rumors were events relating to work at Respondent, since there is no basis for inferring that Respondent would have been particularly sensitive to, nor concerned about, communications among employees relating to non-work-related subjects. In fact, Greco complained that Respondent was having "trouble keeping staff because of the rumors" and wanted to "put an end to all the rumors."

Given the foregoing two facts, and Marshall's corroborated testimony about having communicated to at least some coworkers what had occurred on Labor Day—events which, so far as the record discloses, had been unusual—it appears natural that, during breaks, that Labor Day incident would have become a subject of discussion among at least some of Respondent's employees, as Case testified had been the fact. It cannot be argued persuasively that communication among employees about that incident had not been protected by Section 7 of the Act.

"Few topics are of such immediate concern to employees as the level of their wages." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978). Obviously, communications among employees about wages and other employment conditions are inherently concerted; more than one employee must be involved for such communications to occur, even if only one employee is the speaker while the other is merely a listener. Moreover, the locus of those communications among Marshall and Respondent's other employees is a "uniquely appropriate" one. "The place of work is a place uniquely appropriate for dissemination of views concerning . . . the various options open to the employees." *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). True, exercise of that statutory right at the workplace is not without limitation. However, Respondent concedes that, during the times material to this proceeding, it had no rule prohibiting or restricting employee discussions in its breakroom, nor on the deck smoking area.

As to reaction to Marshall's recitation of the Labor Day events, she testified that Case and Gantz had "said that they didn't think that a person could be sent home if they were scheduled to work," at least not unless that person was working overtime which Marshall, at least, believed was not the situation presented when the premium to be paid was for a holiday, as opposed to work in excess of 8 hours a day or 40 hours a week. In fact, both Gantz and Case testified to having told Marshall that they did not think what had happened on Labor Day had been fair. "We all kind of had the same concerns that, you know, we didn't think that she shouldn't have gotten paid for it," testified Soole, when describing the breakroom communications among employees about the Labor Day events concerning Marshall.

In addition, suggestions were made to Marshall about what course she might follow. Gantz testified that she suggested

Marshall "should check with the wage and hour people." Case suggested "that she ask what procedure was, find out what procedure is" from the human resources department. Soole testified that she and others had told Marshall she should "possible call wage and labor and then finally what I decided was that she should probably talk to Gordie [Greco] about it because . . . he would know." Choice of that latter course was not endorsed by everyone. Case testified that she had recommended that Marshall not approach Greco because Case's experiences with him had led her (Case) to conclude that Greco reacted badly. Case's opinion turned out to be a prescient one. A confrontation ensured on September 4 when Marshall spoke with Greco. During that confrontation, it is alleged that Greco coercively interrogated employees and threatened them with the possibility of termination for their communications with each other, in violation of Section 8(a)(1) of the Act.

During the early afternoon of September 4, as she returned from a break, Marshall approached Greco on the casino floor. He testified that, before having been approached by Marshall, he had been leaving the casino to take some papers to the corporate office. However, a customer had stopped him, he testified, about a malfunctioning ATM machine in the casino and he had diverted from his intended course by walking in the direction of that machine. It was while walking to that machine, testified Greco, that Marshall had approached him, thereby interrupting him.

It is clear, however, that Marshall had not simply interrupted Greco, disregarding in the process whatever Greco may have been intending to accomplish. For, both of them testified that she had asked if she could speak with him and, rather than asking her to wait, that he had said that she could do so. Thus, Marshall testified that she had "asked if I could talk to him real quick." And Greco testified that Marshall had asked, "Do you got a minute?" and that he had responded, "Yes, okay. I got about a minute," or, "I just have a minute."

It is undisputed that Greco did not become perturbed when Marshall asked about what had occurred on Labor Day. When she asked if an employer could schedule an employee for work and then send that employee home, she testified that Greco had replied merely, "Pat may have made a mistake. So what is your question?" In contrast, he testified that he had said only that "Pat did the right thing," and, "Pat can do that." But, when Marshall pursued the subject by revealing that she had been speaking about the Labor Day incident with coworkers, Greco's mood became hostile.

Both Marshall and Greco agreed that she had said that "everybody" or "everyone" was saying that an employer, or Pat, could not do that. And both of them testified that he started asking about the identities of "everybody" or "everyone," though there is a disparity about the order of what he said. Marshall testified that Greco began pointing to casino personnel, asking if so-and-so was "everybody" or "everyone" and, when she answered in the negative, if another named-person was "everybody" or "everyone." After going through two or three named persons, testified Marshall, he asked who is "everybody" or "everyone". Greco testified that he had first asked that general question—who is "everybody" or everyone"—and, then, had started naming people, in each instance asking is that named person "everybody" or "everyone."

During that portion of the conversation, Marshall testified that Greco had begun yelling at her, loud enough to be heard at least by employees and customers who were nearby. Greco never denied that he had begun yelling at Marshall. Working nearby were Case, Gantz, and Soole. All three of them testified that Greco had begun yelling at Marshall. Discussed in section IV, infra, is an internal investigation of Greco's September 4 conduct. One official conducting it was Director of Security Dave Brown. From his review during that investigation of the nonaudio surveillance tapes of Greco on September 4, Brown testified that he had observed "some hand gestures" by Greco on that date. More importantly, when he had interviewed Greco, near the end of that investigation, Brown testified that Greco acknowledged having been "agitated" during his September 4 exchange with Marshall. Therefore, there is ample basis for concluding that when Marshall revealed that she had been speaking with other employees about not being able to work on, and not being paid for Labor Day, and that "everybody" or "everyone" agreed with her that she should have been paid for reporting as scheduled, Greco had become angry and had begun yelling at her, demanding to know the names of "everybody" or "everyone."

Eventually Marshall identified Case and Gantz as the "everybodys" or "everyones." Interestingly, as described above, Greco earlier testified that he had been en route to an ATM machine when stopped by Marshall. He claimed that Marshall had revealed those two names as she was following him when "I started to walk out of the casino"—that is, he claimed, "Debbie was walking with me." That seems illogical, given the uncontroverted fact that, it is uncontroverted, he had begun yelling at her. Marshall simply did not appear to be a person so willing to subject herself to abuse that she would have pursued a course that would have exposed her to continued yelling. By contrast, she testified that, as the two of them remained standing where she had initially stopped Greco, she had identified Case and Gantz, after which she had returned to the gaming table to which she was headed following her break. But, testified Marshall, Greco had followed her, yelling about "getting the everyones [sic] together," and continuing to demand to know who they were.

Two other aspects of that exchange are acknowledged by Greco. First, he testified that, during the course of demanding to know who "everybody" or "everyone" was, he had said to Marshall, "Pat did the right thing, that we can schedule, that you are all employees at will. We can schedule you at any time that we need that business dictates and that you could quit at any time. That's what at will means." Second, he brought up having a meeting with General Manager Pavone. As to the latter, Marshall testified that Greco had said, "Get the everyones [sic] together, and when John Pavone gets back we will discuss thin [sic] in his office." Greco testified that he had told Marshall, "I'll set up a meeting with you and John Pavone to clarify this."

The fact is, however, that Greco admittedly did not wait to arrange any such meeting with Pavone. Instead, seemingly abandoning further concern about a malfunctioning ATM ma-

chine and any need to deliver papers to the corporate office, he pursued the subject of discussions among employees.

Soole testified that after Marshall had returned to work, Greco summoned Ebaugh to the casino podium and loudly asked Ebaugh, "Who is this everybody? Do you know what any of this is about?" After Ebaugh answered in the negative, testified Soole, Greco yelled at then-Table-Games-Shift Manager Mark Solheim, who was at the other end of the pit, if Solheim "knew anything about what was going on, if he knew who everybody was," but Solheim also responded in the negative. "So Gordie paced around and—in front of the roulette table," according to Soole, after which he asked another employee to tap-off[4] Marshall so that he could talk to her again. Greco, Ebaugh, and Solheim all appeared as witnesses for Respondent. None of them contradicted Soole's above-described testimony.

In fact, Greco acknowledged, "And I sat down with Debbie [Marshall] again and at that time I believe I had Mark . . . get Joyce and ask Joyce" Gantz to come to where he was, at the end of the roulette table then not open for business. Gantz and Marshall each testified that she had arrived there before the other one. Nonetheless, there is no material dispute about what was said during the ensuing conversation, though in some respects one or the other provided somewhat more concrete or complete accounts than the other two and, additionally, both dealers testified, without contradiction, that Greco had continued yelling and was loud, appearing to be "mad" or "upset."

Gantz testified that Greco "started" by saying that inasmuch as she "had worked at other casinos," Gantz "possibly knew a little more of some of the things that go on than some of our other employees," after which he "asked me if I knew what an at will employee was." At-will employee status was described in Respondent's then-current employee manual, a copy of which had been given earlier to Gantz. However, she testified that, when she had read that manual, "I didn't just concentrate and focus on that [at-will employee]. I didn't—kind of passed over it I guess." Independently of that manual, Gantz testified that she had some idea of what the term meant, but "I think actually I still thought that you had—there had to be a reason for termination." Even so, she further testified, "I was already nervous and upset by the time I got over there," from having heard Greco yelling, and, "so I chose to just say I didn't know."

According to Gantz, Greco then "said that an at will employee meant that he had the right to fire someone and didn't have to have any reason," and that Marshall had the corresponding right to quit whenever she wanted without providing a reason, adding "that when Deb was sent home that day that he could have just fired her instead of letting her go for the day, that he had that right." Gantz testified that Greco "said then to me two or three times . . . 'I want you to know that I have the right—an at will employee means that I have the right to fire you any time I want and I don't have to have a reason. Do you understand that?'" "Most of the time I just sat and listened," testified Gantz, because, "I didn't want to aggravate the situation anymore."

Marshall agreed that Greco had "told us that we are at-will employees" and that "he can fire us any time he wants to, we can quit any time we want to, and he doesn't need a reason to fire us," adding "that it is in our employee manual, we can look it up if we want, and so forth." Marshall did not mention Gantz's above-described "two or three times" repetition by Greco of his "right to fire you any time I want and I don't have to have a reason." On the other hand, Greco never denied having repeated that message to Gantz. In fact, at least in part, he did acknowledge having conveyed that message to her: "I said to Joyce the same thing. 'We are all employees at will here. Business dictates the hours that we work and, no, the Company does not have to do that [allow a scheduled employee to work]. You may quit or you may be fired at any time by the Company at their discretion."

There was another undisputed component to Greco's meeting with Gantz and Marshall. The latter testified that Greco had "asked what made us think that we—that I couldn't be sent home." Gantz testified that Greco "wanted to know who I thought I was by trying to give advice about what they could or could not do with setting policy for the Belle and so forth." "I may have. I don't recall," Greco testified, asked Gantz what reason or business of hers it was talking to Marshall about being sent home on Labor Day when she had been scheduled to work. Yet, he did acknowledge having asked Gantz what she had told Marshall: "I said to Joyce 'Are you telling Debbie'—Are you telling Debbie that we have to pay her because we scheduled her?'"

When Greco finished talking with Gantz and Marshall, he had the latter remain while Gantz tapped out Michelle Case, and told Case to join Marshall and him. Greco acknowledged having said pretty much to Case what he had said to Gantz—having made statements both about at-will employee status and having asked what Case had said to Marshall about the Labor Day incident. Thus, both Marshall and Case testified that, when the latter had arrived, Greco had asked if she knew what an at-will employee was, to which Case replied someone who could be fired or quit anytime. While Greco did not disagree that such an exchange had occurred, he did not place it at the beginning of his meeting with Case and Marshall.

When Case arrived, he testified, "I said 'Michelle, did you tell Debbie that she has to be paid for being scheduled on Monday?'" and Case admitted having done so. Case testified that, at whatever point during the meeting that comment had been made, Greco then had asked her, "Is that any of your business?" During cross-examination Greco admitted that he had asked why Case had thought it was her business to talk to Marshall about that subject. Furthermore, he never denied Case's description that when she had answered, "I guess I am kind of a bleeding heart" and "didn't feel it was fair that [Marshall] had had to give up her other job and then was sent home," he had retorted that "he didn't pay me to be a bleeding heart, he paid me to deal," and "that he was the boss, that he ran the place. We were not a union shop, and he was going to basically do things his way."

It apparently was at that point that something was said about the legality of Marshall's having been sent home. According to the uncontradicted testimony of Marshall and Case, Greco as-

[4] Whenever replacing a dealer who is working, the replacement taps that dealer on the back or shoulder, after which the dealer completes any game in progress and yields the deal to the replacement.

serted that if they wanted to talk about legalities, he only needed to give table games employees two breaks during their shifts, as opposed to current practice of giving dealers breaks ever 40 minutes or hour. Nor did Greco dispute Case's characterization of him as being "still very angry" during the meeting. And he did not deny the accounts of by-then working-nearby dealer Gantz that, "He was still very loud," nor of Soole that "he was just in a rage" and continuing to yell.

Greco never did testify to ever having tended to the reportedly malfunctioning ATM machine that day. Apparently it became a forgotten problem once Marshall revealed information showing that she had been discussing with other employees not having been paid for work scheduled, but not performed, on Labor Day. In fact, Greco never claimed that he had taken the papers to the corporate office. Instead, he testified that had gone to the office of another official—Mike D'Amato, the co-team leader with whom Greco had been paired to operate the casino floor more smoothly—and had related to D'Amato the exchanges with Marshall, Gantz, and Case. According to Greco, D'Amato, who did not appear as a witness, though there was neither evidence nor representation that he was unavailable to testify, felt those exchanges had been significant enough to warrant telephoning then-Employment Specialist Barbara Holsinger to inform her what had occurred. Holsinger did appear as a witness, both one called by the General Counsel and, later, by Respondent. But, she gave no testimony regarding what had been said during that telephone conversation.

According to Greco, Holsinger pointed out that at-will employment was described on page one of the employee handbook. Greco testified that he then made three copies of that page and left one copy each for Marshall, for Gantz, and for Case. There is no dispute about the fact that all three of those employees received those copies. What is significant is that the copies' text makes no mention of work scheduling, nor of not working after having been scheduled for work. Rather, the page's text states, in pertinent part: "You have been hired as an 'at will' employee. This means that your employment is for no fixed period of time and that if you and [Respondent] ('Company') so agree, it may be terminated by the Company or by you at any time for any reason."

By way of explanation for his above-described September 4 conduct, Greco testified, "I was trying to set the record straight that they can be scheduled due to business needs and there is no—no demand for the company to pay them or to compensate them" He further testified that he felt that effort was especially warranted in light of "constant turnover" and "trouble keeping staff" which, at least in his view, had resulted from low morale caused by "rumors and everything that goes on on that boat as far as rumors, rumors, rumors, rumors and we wanted to get to the bottom of it and put an end to all the rumors," especially since it involved "[m]y department," as well as "the entire company."

B. Discussion

As concluded in the preceding subsection, on September 4 it had not been Marshall's "personal gripe"—about not having worked on Labor Day after having reported as scheduled—which had angered Greco. Rather, it had been her disclosure that "everybody" or "everyone" agreed with her—a disclosure which, inherently, revealed that she had been communicating with other employees about the Labor Day events—which had turned Greco's mood to a hostile one.

The mere fact that there had been communication among Marshall and at least some of Respondent's other employees would not necessarily mean that her act of later approaching Greco had been activity which was concerted within the meaning of Section 7 of the Act. To be concerted such communications among employees must also "appear calculated to induce, prepare for, or otherwise relate to some kind of group action." *Salisbury Hotel*, 283 NLRB 685, 686 (1987). See also, *Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir. 1993); *Adelphi Institute*, 287 NLRB 1073 (1988). Even so, as pointed out in subsection A, above, employment terms such as wages—not being paid after reporting for work as scheduled, but not being needed—are important to all employees.

While the Labor Day incident had affected only Marshall, as a result of it other employees had learned about the possibility of confronting the same situation. Indeed, such a situation would have confronted Floyd Woods, had Marshall not left and had Woods been the loser when selection was made through chance. In consequence, although Marshall had been "the only one of them who ha[d] any immediate stake in the outcome of" the Labor Day incident, other employees became aware of what had occurred and knew that by supporting Marshall in her particular situation "each one of them assure[d] himself, in case his turn ever comes, of the support of the one whom they are all helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." *Peter Cailler Kohler Swiss Chocolates Co. v. NLRB*, 130 F.2d 503, 505–506 (2d Cir. 1942), cited with approval, *Houston Insulation Contractors Assn. v. NLRB*, 386 U.S. 664, 668–669 (1967).

In fact, the evidence does establish that at least some of Respondent's other employees agreed with Marshall that she had not been fairly treated on Labor Day, as described in subsection A, above. To be sure not all of Respondent's employees appear to have agreed with her about that subject. However, uniformity of employee-complement's view is not a prerequisite for activity to be concerted within the meaning of the Act. Were that the fact, then likely there would be few instances when activity for "mutual aid or protection" would be found to exist. In the area of the parallel Section 7 protected activity of forming, joining, or assisting a labor organization, it is a rare situation when all of an employer's employees agree that unionization is desirable. Yet, that does not preclude from statutory protection those who do seek to become unionized. Neither should it preclude from statutory protection the efforts of unrepresented employees whenever only some of them agree that a particular employment term is not satisfactory and seek to change or mitigate it. And the evidence does establish that there had been activity by more than just Marshall in connection with her Labor Day experience.

It is important to keep in focus that this is not a situation such as the one presented in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), where the discharged employee had made no effort whatsoever to even speak with his coworkers about the situation which had upset that employee. Here, in contrast, not only

did Marshall complain to other employees about what she had experienced—activity inherently concerted because it involves a speaker and listeners—but some of those other employees agreed that she had been treated unfairly. And some other employees continued discussing among themselves Marshall's Labor Day experience. Even if not all of them agreed that she had been treated unfairly, accordingly, that event became a matter of common concern and ongoing discussion among Respondent's employees, in contrast to the situation underlying the oft-rejected, see cases cited in *Enterprise Products,* 264 NLRB 946, 948–949 (1982), and now discarded, *Pikes Peak Pain Program*, 326 NLRB 136 (1998), doctrine of *Alleluia Cushion*.

More importantly, as also described in subsection A, above, various employees acted on their agreement that Marshall had been treated unfairly; they suggested actions which could be taken by her in connection with perceived unfair treatment. That is, some employees suggested steps which Marshall could take to obtain redress. In that regard the situation differs not at all from one where employees support redress for the discharge of one of their coworkers. Only one employee benefits, should reinstatement occur, but the activities to obtain that objective are no less concerted than if more than one employee benefited directly.

To be sure, none of those suggestions by other employees contemplated specific action as a group. However, even the actions of "a single employee" can be concerted within the meaning of Section 7 of the Act. *NLRB v. City Disposal Systems,* 465 U.S. 822, 838 (1984). Respondent's dealers are not represented by a union and, consequently, were obliged "to speak for themselves as best they could." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). To hold that her approach to Greco on September 4 had not been supported by any others, actually marching in lockstep with her at the time, is to adopt a rather crabbed view of the Act's protection. Rather, Marshall's approach to Greco on September 4 constituted "a continuation of [her] protected activity" of communicating with other employees about the Labor Day incident and of adopting one of their suggestions about what she might do to obtain redress, thereby being "a logical outgrowth of" those communications among Marshall and other employees. *Every Woman's Place*, 282 NLRB 413, 413 (1986), enfd. mem. 833 F.2d 1012 (6th Cir. 1987). For, "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group." (Citation omitted.) *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992).

Independent of the foregoing discussion, Marshall's activity in approaching him on September 4 had been perceived by Greco as having been group sponsored. Her initial question, about the propriety of not being able to work as scheduled on Labor Day, had caused him no apparent disquietude. He simply answered it; whether saying that Sprague had done the right thing or not matters not, as an analytical proposition. As pointed out above, however, his disquietude changed upon learning that "everybody" or "everyone" agreed with Marshall's position, that she had been treated unfairly, and he began to yell at Marshall. Later, he focused upon the very collective aspect of what she had related to him, asking Gantz "who [she] thought [she] was by trying to give advice about what [Respondent] could or could not do with setting policy," and, he admitted, demanding to know what business Case had talking to Marshall about the Labor Day incident. Both through his words and conduct on September 4, Greco demonstrated that he believed that he was confronting group action by at least some dealers—that Marshall simply was fronting for a group of employees.

When an employer, or its agent, lumps employees together and treats them as a group, that employer demonstrates that it is treating them collectively. *Enterprise Products,* supra, 264 NLRB at 949, and cases cited therein; *Whittaker Corp.*, 289 NLRB 933, 934 (1988). Consequently, regardless of whether Marshall had actually been acting as some sort of group representative when speaking with Greco on September 4, once he learned about "everybody" or "everyone" he treated the situation, through his demands for names and through his meetings with the two employees named by Marshall, as one which presented group—concerted—activity. And by his ensuing demands and meetings that day, Greco challenged the right of those three employees to communicate with each other about an employment term which, Marshall told him, employees agreed had been unfair.

Of course, Greco did not actually know whether Marshall had approached him as a group representative. The evidence shows that had been only his belief. Nonetheless, "the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities." *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). Belief or suspicion supplies the requisite showing of knowledge in situations where union activity is involved. See, e.g., *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997). No analytical reason is apparent for applying a different rule to the parallel Section 7 right of employees "to engage in other concerted activities for the purpose of . . . other mutual aid or protection".

Therefore, I conclude that the evidence does support the contention that Respondent's employees had been—or, at least, had been regarded or suspected by Greco of—engaging in concerted activity in connection with a term of employment. In those circumstances, Greco's questioning of Marshall about the identities of other employees to whom she was referring, as sharing the view that she should have been allowed to work as scheduled on Labor Day, was a violation of the Act. Under the Act an employer cannot question employees about the identities of union proponents or supporters. See, e.g., *Suma Airlines*, 317 NLRB 383, 383 (1995); *Soltech, Inc.*, 306 NLRB 269 fn. 3 (1992). Again, there seems no analytical reason to treat differently an employer's questions about which unrepresented employees are involved in a seeming concerted effort to change or mitigate a particular employment term.

Any argument that Greco had a legitimate purpose—to correct misconception about Respondent's policy—for demanding that Marshall disclose those names is an argument which falters, at least in the circumstances presented here. It was not necessary for Greco to know the names of employees with whom Marshall had communicated. He merely had to tell her

that scheduled employees could be sent home without being paid and, then, left her to communicate that message to the other employees with whom she had been speaking. Certainly, he could have logically felt that she would do so. After all, it had been her acknowledged communications with other employees which had led her to him on September 4. Surely, he could have perceived that she would communicate back to those same employees whatever answer he gave to her.

Had he felt that he needed to more widely disseminate among employees that policy, an assertion which Greco never really made, there were alternative, less intrusive, methods of accomplishing that objective. He could have announced Respondent's policy, in writing or orally, to all of the employees. Or, as he suggested at one point to Marshall on September 4, Greco could have arranged for a meeting between Pavone and employees who were willing to identify themselves by appearing at such a meeting.

Any shred of lawfulness which might otherwise be found to exist for Greco's demands for names is torn away totally by his conduct after having received two names from Marshall. Not only had he been antagonistic toward Marshall when demanding the names, but he acted confrontationally during his meeting with her and Gantz, and during his following meeting with Marshall and Case. He continued yelling, it is undisputed. He did not confine the substance of those meetings to merely informing employees that Sprague's Labor Day actions had been consistent with Respondent's policy. As described in subsection A above, Greco challenged the right of Gantz and Case to even discuss Marshall's Labor Day experience and demanded to know why Gantz and, then, Case had expressed her opinion to Marshall that the policy was unfair.

At no point that day, so far as the record discloses, did Greco assure Marshall, Gantz, or Case that she need not answer any of his questions. At no point did Greco assure any one of the three employees that she would not be subjected to retaliation as a result of answers given to his questions. To the contrary, with all three he raised the possibility of discharge—and he did so in a setting in which employees working nearby would hear what he was saying.

No doubt that, as part of any explanation of Respondent's policy, Greco could lawfully have explained that Marshall, Gantz,, and Case were at-will employees to whom Respondent owed no obligation to provide full-time work nor, even, work when scheduled to report. But, he went further by raising the not logically related discharge aspect of at-will employment. For example, as described in subsection A, above, it is undisputed that he had yelled repeatedly at Gantz, "I want you to know that I have the right—an at will employee means that I have the right to fire you any time I want and I don't have to have a reason."

Respondent's ability to fire at-will employees has no logical or natural relation to its ability to schedule employees and, then, not permit them to work because of lower than anticipated business. And Greco never explained why he had drifted so far from the subject raised by Marshall on September 4. Viewed from employees' perspective, it is difficult to conclude other than that, by going beyond the issue of scheduling and injecting the unrelated one of discharge, Greco had been threatening discharge because of Marshall and others' statutorily protected activity of discussing an employment term which dissatisfied those employees and of action which might be taken to correct it or, at least, mitigate its effects on them.

True, at least at some points on September 4, Greco also said that at-will employees could quit whenever they wanted to do so. But that addition hardly improves Respondent's position. In the context of the totality of Greco's comments, that statement partakes more of unlawful invitation to quit if employees find any of Respondent's policies distasteful, see, e.g., *McDaniel Ford,* 322 NLRB 956 fn. 1 (1997), and *NLRB v. Intertherm, Inc.*, 596 F.2d 275, 276 (8th Cir. 1979), than being some sort of effort to present a balanced description of at-will employees' situation. After all, there is no evidence that any of Respondent's employees, at least its dealers, had signed any sort of employment contract. So, it hardly provided them with information not already obvious to them: it is a rare employee who is unaware that she/he is free to quit employment. It surely was a revelation, however, that Greco could fire at-will employees without any reason—at least, it was for Gantz, as she testified.

There can be sympathy for an employer's concern about rumors which circulate among its employees. Anyone in a management or administrative position has experienced the problems which such rumors can create. That is not what is involved here, however. Greco appeared perceptive enough to understand that he was not confronting a simple rumor on September 4. Rather, he at least believed that he was confronting an employee-group's dissatisfaction, as related by Marshall, with one of Respondent's policies. In turn, he reacted by trying to find out the names of those involved and, then, to dissuade further communication among employee regarding that dissatisfaction with Respondent's policies.

In light of all the evidence, I conclude that Greco's remarks about being able to discharge at-will employees were threats, not mere expressions of opinion or mere statements of an existing employment situation, which violated Section 8(a)(1) of the Act. Those statements, and the other circumstances of his demands for names from Marshall and of his demands for Gantz's and Case's reasons for communicating with Marshall about her Labor Day experience, demonstrate that Greco's questioning of those three employees had been coercive, thereby violating Section 8(a)(1) of the Act, as well.

III. SEPTEMBER 9 WRITTEN WARNINGS ISSUED TO MICHELLE CASE

By the time of the hearing Case no longer was working for Respondent, having left at the end of January 1998. Before then she had worked continuously for it since September 1994. She started as a dealer. During 1995 she was three times offered promotion to the position of floor person or floor supervisor. She declined to accept promotion, because she believed that she lack qualifications needed for the position and felt that no training was available to become familiar with what she would need to do. After a 6-week leave of absence for surgery, however, Respondent renewed that promotion offer and Case accepted a floor supervisor's position.

Things did not work out during the approximately 6 months she occupied that position. While serving as floor supervisor,

she was twice disciplined: once for a $24,000 mistake and, the second time, for missing a summertime cruise on which she had been scheduled. After that second discipline, she requested return to the position of dealer and her request was accommodated during late 1995, possibly during early 1996.

Thereafter Case continued working as a dealer until she resigned. During the over the year-and-a-half between Case's renewed work as dealer and September 9, it is uncontroverted that she received good performance evaluations and the highest raises allowable. Further, during that period she received no disciplinary records of counseling. In sum, aside from having twice been disciplined during 1995, by September 9 Case had an exemplary employment record, especially for over a year-and-a-half since 1995.

On September 9 Greco gave Case two Records of Counseling. Both bear the date "9-8-97" and, in the section for "Disciplinary [sic] ACTION FOR THIS "INCIDENT," an "X" was placed beside the printed words, "Written Warning." Those printed words are hand-circled on one Record of Counseling; both those printed words and the "X" are hand-circled on the other one.

All other considerations aside, given her above-described uncontested employment record for over a year-and-a-half prior to September 9, and Respondent's progressive disciplinary policy—from verbal counseling and, then, to written warning—as an objective matter it is somewhat baffling that verbal counseling for Case would be skipped on September 9 and she would receive two written warnings. In retrospect, claimed Greco, "one should have been a counseling and one should have been a written warning." In other words, Greco testified, there simply had been a mistake. Yet, that is difficult to credit, in view of the obviously deliberate hand-circling on both records of counseling.

Greco acknowledged that he had made those circles. They obviously show that he had been paying close attention to the text of those Records of Counseling when he circled portions of them. And that was not the lone problem with his explanations about the two Records of Counseling issued to Case on September 9.

On one of them he acknowledged that he was the official who had written, as "Description of conduct or performance which resulted in counseling session:" that "Michelle inaccurately made disparaging remarks to another employee, Deb Marshall concerning departmental [and] company policy involving overtime requirements which resulted in dissension within HeR [sic] dept." In the "Performance expectations and specific actions employee must take in order to improve:" section of that Record of Counseling, Greco acknowledged having written, "Michelle is to come to work as assigned and perform her own job responsibilities and not concern herself with her supervisors[']responsibilities. Further infraction of this counseling will result in more severe disciplinary action being taken up to and including termination." Greco admitted that this Record of Counseling had been based upon Case, "Saying the company had to pay for scheduling Deb."

The second Record of Counseling states, in the "Description of conduct . . . section, "Michelle made disparaging remarks [illegible] They fired Gary farley [sic] for being rude to customers but they wouldn't fire Gary for being rude to employees. This is inaccurate and created dissension in the casino." In the "Performance expectations . . ." section of that Record of Counseling, Greco acknowledged having written, "Michelle is to come to work as scheduled[,] perform her duties and responsibilities as scheduled and required[,] and stop spreading lies. Further disciplinary action may result in more severe [omission] should this continue." Greco testified that the subject of comments about Farley had referred to an incident which occurred away from Respondent's premises.

As to that incident, Case testified that she had encountered difficulty when starting to deal craps. At that time Gary Farley was a floor person or floor supervisor. He displayed no patience with her difficulties, sometimes swearing at her and, at least once, pushing her aside during a game so that he could replace her as dealer. Respondent's officials did not contest Case's testimony that she had complained about Farley's conduct to Shift Managers Sprague and Sherry Rich and, eventually, to Greco, himself. As a result, Case never denied that she had been overjoyed to learn that Farley and Respondent had parted employment company.

It was in connection with that parting that Greco accused Case, in the second Record of Counseling, of "inaccurate" statements and of "spreading lies" about Farley's departure. Apparently during the early evening of Sunday, September 7 Case and approximately nine of Respondent's other employees were patronizing Bob's Tavern in Sioux City. There, they were talking about Farley's departure, apparently celebrating their perception that he had been fired. The owner of that tavern—identified by Greco as Bob Roe Jr.—later, in company with others, came to Respondent's casino. While there, they mentioned what Case and the other employees had been saying about Farley. It was that report which led Respondent to issue the above-mentioned second Record of Counseling to Case on September 9.

According to Greco, Roe, and his companions had "complained to—the shift manager at that time was Tom Pletsch about the party that was going on at the Belle of Sioux City—from the Belle of Sioux City and how we fired Gary Farley for being rude to all of these customers and we'd never fire Gary Farley for being rude to Michelle Case or to the dealers." In turn, claimed Greco, Pletsch had reported to him (Greco) that Roe and his group had said that "our casino dealers" were engaging in a "we fired Gary Farley party" at Roe's tavern. Furthermore, testified Greco, Pletsch reported "that there is discussion among the supervisors and everything that we fired one of [the] supervisors," and "that all the supervisors are upset, that they think they are getting fired too. Paranoia on the boat." Yet, Greco admitted that he never bothered to speak with any of those supervisors about the substance of that asserted report by Pletsch.

Significantly, not one supervisor called as a witness by Respondent gave any testimony about having learned what had occurred at Bob's Tavern, nor about having become upset over whatever he or she may have heard was said at Bob's. That is, no supervisor testified to having become fearful that one or more of the supervisors might also get fired. Indeed, such a supposed fear would seem illogical if, as Greco claimed, Farley had not been fired.

More importantly, Pletsch had voluntarily come from Las Vegas, Nevada, to Sioux City for no seeming purpose other than to testify on behalf of Respondent in this proceeding. When doing so, however, he corroborated not a whit of Greco's account about reporting a "we fired Gary Farley" party at Bob's Tavern. That is, someone at Respondent—perhaps it had been Pletsch—obviously had been told that Case and other employees had been talking about Farley's departure while at Bob's Tavern. However, Pletsch never testified that Roe or anyone in his party had "complained" about what those employees had been saying there.

Nor did Pletsch corroborate Greco's account concerning Pletsch reporting to Greco that there had been "discussion among the supervisors" about Farley's departure in light of whatever Roe and his party might have said while at Respondent. In fact, there is no evidence that any supervisors, other than possibly Pletsch, had even known about whatever Roe and any of his group might have said to Pletsch about what occurred at Bob's. Equally important, Pletsch never testified that Respondent's supervisors, or any of them, had become "upset" and fearful of "getting fired too." Indeed, when testifying Pletsch never claimed that he had made such statements to Greco. Accordingly, Greco's entire testimony about patrons from Bob's Tavern making complaints at Respondent, and about Pletsch having reported about those complaints and about supervisors becoming upset as a result of statements made at Bob's Tavern, is without any corroboration by any other witness.

With respect to how the decision had been made to issue two Records of Counseling to Case, Greco testified that dissension in the casino department had broken out as a result of Marshall's dissatisfaction about the Labor Day events: "there were dealers that were divided that Deb was totally I'll use the term being an ass and everything for bringing—bringing up this issue and starting this—this whole thing over overtime so her particular table was completely divided in half on whether or not Deb should have been paid for being scheduled to work on Monday or not." Asked how he had supposedly known that, Greco testified that he had been told that by dealer Connie Stople. But, Stolpie was never called to corroborate Greco's testimony that she had made such a report to him, though there was neither evidence nor representation that Stolpie was not available to be called as a witness. And there is another aspect of Greco's testimony about Stolpie's purported report which should not escape notice.

There were various points during cross-examination, in connection with events alleged as unlawful, when Greco appeared to be avoiding immediate direct answers, instead providing answers which were unrelated to questions put to him. It appeared to me that he was doing so to buy himself some time to figure out what he could say that would not injure Respondent's position and, conversely, aid that of Case and Soole. A clear objective illustration of that tendency occurred in connection with what Stolpie supposedly had said to him about the purported division among dealers.

Asked, based on that supposed report by Stolpie, who were the "divided" dealers, Greco answered initially, "Yeah. Marla. And Debbie could have been one." He did not at that point mention Case, the employee disciplined on September 9. Asked if Stolpie had reported where Marla Soole's sympathies had been—a question which could yield an answer possibly damaging to Respondent's positions concerning the allegations of unlawful conduct directed against Soole—Greco responded, "No. Connie told me—Connie told me that they recently concluded a craps class, that the people that were in my classes were referred to as Gordie's angels. They could do no wrong. Connie was one of those members." Of course, that situation would seemingly have nothing to do with Marshall's Labor Day experience and the events arising from it.

In an apparent effort to bring Greco's attention back to a supposed report by Stolpie about division arising from the Labor Day incident, he was again asked who was on one side and who was on the other side of that asserted division. He answered, "Well, that's what I was trying to figure out as the casino manager. Everybody was stabbing everybody in every direction." Yet, when once more asked what Stolpie had told him "about who is where?" Greco resumed ruminating about "all the ones that were in my class . . . being ostracized by the other ones," and, again, claimed that Stolpie had reported "that they were being picked on because they were a member of Gordie's angels." Asked then if it wasn't "right" that he meant that whatever Stolpie reported had pertained to "Gordie's angels," rather than to dissension caused by "a remark that Michelle made about overtime," Greco testified evasively, "I can't say what's right or wrong. I can just tell you that it was part of the discussion." But, he never explained what "part."

When it was pointed out to Greco that he had written "disparaging remarks" in the first of the above-described second Record of Counseling, Greco testified, "Connie told me that Deb [Marshall] was a butt—was being a butt and the rest of the crap crew was being a butt because of the fact that she didn't get paid her overtime for showing up to work." Then it was pointed out to him that the Record of Counseling had been issued to Case, not to Marshall. In response, Greco abruptly switched to another scenario: "I believe Michelle had made some statements to one Sharon Dalton." But, he had never mentioned Dalton during direct examination "when, presumably, Respondent was presenting the facts in a posture most favorable to its defense." *McKenzie Engineering Co.*, 326 NLRB 473, 480–481 (1998). Thus, his failure to mention Dalton at that point raises some question as to her purported involvement in events pertaining to Case. In fact, Dalton was never called to corroborate Greco, though there was no evidence or representation that she had not been available to be called as a witness.

Greco continued by testifying that Dalton had been upset with whatever supposedly had been said to her by Case and had reported as much to him. Yet, Greco never described with particularity the "statements" which Dalton supposedly reported had been made to her by Case—that is, never described any statements by Case which could objectively be said to be "disparaging" and, further, could likely lead to "dissension within [Case's] dept."

Lack of corroboration for Greco's testimony gained even more pronounced significance in connection with his testimony regarding the immediate events of the decisions to issue two

Records of Counseling to Case. During direct examination he attributed those decisions to Kathy Allan, Holsinger's predecessor as director of human resources: "Ms. Allan—I don't know if Mr. Pavone was involved in that but I took the issue to Ms. Allan. Ms. Allan at that time said there is too much of this going on and we have to start somewhere. Let's go ahead and put this on paper." According to Greco, he then prepared the two Records of Counseling and read over the phone to Allan what he had written, after which she said to give them to Case.

As already noted, Allan did not appear as a witness and, thus, there is no corroboration for Greco's description in the immediately preceding paragraph. During cross-examination he particularized a little more those asserted events. He testified that he had gone to Allan's office about the Marshall Labor Day incident. While there, he testified, he had "[t]old her about the party that the customers were talking about the night before." It was at that point, testified Greco, that the decision had been made to add a Second Record of Counseling, based upon the "we fired Gary Farley party." Asked why Case had been singled out for discipline, when he knew that other employees had been involved in the "party" at Bob's, Greco responded that it had already been decided to give Case the one Record of Counseling and so, the second one simply was added to accomplish the objective of "trying to curtail" what he and Allan construed as "constant dissension of [sic] bad mouthing the boat."

Both Records of Counseling were issued to Case by Greco on September 9. Present also were Table Games Shift Manager Sprague and Cage Manager Emma Patterson. Only Case and Greco testified about what had been said during the September 9 meeting, when she was told about the Records of Counseling. Moreover, for the most part Greco did not contradict Case's description of what had been said during that meeting.

To the extent pertinent, he did not deny having asked about her relationship with Farley, to which she replied that he knew about that relationship, because she had come to him about the asserted mistreatment to which she had been subjected by Farley. He asked, it is uncontroverted, if Case had been saying that Farley was fired and she responded, "Yes, everybody on the boat is talking about it," to which Greco retorted, "I want you to know that Gary has not been fired." Importantly, Greco never denied that Case had then said that a supervisor told her that Farley had been fired, after which he repeated, "Well, he wasn't fired, that is a lie and you are going to stop spreading lies." So far as the record discloses, Greco displayed no interest in ascertaining the identity of the supervisor who, Case informed Greco, had told her that Farley had been fired.

In addition, Greco never disputed Case's testimony that, during their September 9 meeting, he had asked her, "Just exactly what did you say to Deb Marshall?" Thus, he took another walk down the path which he had followed 5 days earlier, as discussed in section II, above. When Case replied, "I told her I didn't think what happened was fair and she needed to check the rules," mentioning again that she was a bleeding heart, Greco did not deny having "reiterated that he did not pay [Case] to be a bleeding heart, he paid [her] to deal."

Based on the foregoing recitation of the evidence, I conclude that a preponderance of the evidence does support the allegation that both written warnings violated Section 8(a)(1) of the Act. The one for "disparaging remarks" to Marshall had been based upon activity protected by Section 7 of the Act, as concluded in the preceding section. As to it, therefore, the analysis of *Waste Stream Management*, supra, does apply: that written warning was for engaging in activity protected by Section 7 of the Act and, consequently, did "reasonably tend to interfere with, threaten or coerce employees in the exercise of their rights under Section 7 of the Act." 251 NLRB at 1099–1100. Nonetheless, in the interest of completeness, some attention should be paid to Respondent's defense.

As set forth above, Greco attributed the decisions to issue both Records of Counseling to Allan. She was never called as a witness, with the result that Respondent's defense lacks testimony by the official who had made those allegedly unlawful decisions. However, where motivation is at issue—as is the fact with respect to the second Record of Counseling issued to Case on September 9 and, as will be seen, as it is with all of the disciplinary actions covered in section V, below—it is "[t]he state of mind of the company officials who made the decision" which is the focal point of inquiry, *Abilene Sheet Metal, Inc. v. NLRB*, supra; see also *Schaeff Inc.*, 321 NLRB 202, 210 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997); *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem. 698 F.2d 1231 (9th Cir. 1982), within the overall methodological framework of *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as modified in *Office Workers' Compensation Programs. v. Greenwich Colleries*, 512 U.S. 267, 276–278 (1994).

Obviously, a complete evaluation of motivation cannot be conducted where an official assertedly involved in a challenged decision is not called to explain her motive. See, e.g., *Douglas Aircraft Co.*, 308 NLRB 1217, 1222 (1992). For, that explanation is "peculiarly within [the decision-maker's] knowledge," *McKay v. Commissioner*, 886 F.2d 1237, 1238 (9th Cir. 1989), and that person is in the best position to supply "testimony [that] would elucidate the transaction," *Graves v. U.S.*, 150 U.S. 118, 121 (1893), in this instance the actual reason for issuing the written warnings to Case on September 9.

Nevertheless, as an analytical matter, Allan's failure to appear as a witness, standing alone, cannot be overly emphasized—elevated to an overly-significant level. With or without her appearance, the General Counsel bears the ultimate burden of establishing an initial showing that animus toward statutorily protected activity had motivated personnel action taken by Respondent. Even were that to be shown as a threshold matter, Respondent need not produce Allan as a witness to rebut the General Counsel's threshold showing, so long as Respondent presented evidence showing a legitimate reason for its personnel actions, such as the second Record of Counseling issued to Case. The problem for Respondent is that some of its arguments are ones not sustainable under the Act or, in other instances, are ones based upon testimony which is not credible.

To the extent that some remarks by Case, about Marshall's Labor Day experience, may have caused "dissension," that is an anticipated consequence of union or other concerted protected activity. After all, communications among employees about perceived unsatisfactory employment terms are inherently

likely to cause some dissension between those employees and their employer, as well as between dissatisfied employees and those who are satisfied. However, as pointed out in section II,B, above, dissension so caused does not divest the dissatisfied employees of statutory rights which Congress has conferred. To be sure, some forms of dissension—violence, interruption of work performance—does exceed what Section 7 of the Act protects. However, that is not an issue here, since there is no evidence of violence or work interruption having taken place in connection with the employees' activities on September 2 through 4.

Nor is Respondent aided by brandishing the word "inaccurately" in Case's Record of Counseling. Such a word implies that Case had been making misrepresentations about "company policy." But, there is no credible evidence that Case had made any misrepresentations in connection with the Labor Day events. As she indisputably told Greco on September 9, Case had told Marshall no more than that, "I didn't think what happened was fair and she [Marshall] needed to check the rules." Those are not statements of fact; they are statements of opinion. Consequently, instead of being misrepresentations, Case's actual statements were ones rooted at the very core of Section 7: employee expressions of dissatisfaction with an employment term and communications about possible courses for obtaining correction or mitigation of that employment term.

Much was made of the fact that, in the end, Marshall had chosen to leave on Labor Day, rather than submit to selection by chance. Even if statements about Marshall having been sent home were ones that rise to the level of misrepresentation, however, they were statements made by Marshall, not by Case. Yet, Marshall received no Record of Counseling on September 9, nor on any other date, for having "inaccurately made disparaging remarks."

Furthermore, any such distinction is one without a true difference. It is uncontroverted that one employee was going to be sent home on Labor Day. Sprague had tried to send Marshall home and, then, had tried to send Woods home. Neither was willing to leave. So, Sprague decided to make a choice by resorting to chance. At that point Marshall left. Nothing in that sequence of events is at odds with the overall employees' objection that an employee had not been paid after reporting as scheduled, because business was not so brisk as anticipated when the work schedule had been prepared. Thus, even had Allan appeared and testified to the foregoing reasons for Case's first Record of Counseling, such testimony would not have supplied a legitimate defense for that Record of Counseling.

With regard to both Records of Counseling, it cannot escape notice that by September 9 Case had enjoyed an exemplary employment record for over a year and a half, as described above. Were Respondent truly bent upon imposing legitimate discipline under its progressive disciplinary system, it seems that Case would have received a verbal counseling and a written warning, not two written warnings. Yet, it was the latter which Case received.

Allan did not appear as a witness and, thus, there is no explanation by her regarding issuance of two written warnings to Case. Absent her testimony, Respondent is left to rely upon Greco's explanation. Yet, as stated in section I, above, Greco was not generally a credible witness. In connection with the two written warnings issued to Case, by the time he testified it appeared evident to Greco that such discipline was objectively excessive for an employee in Case's employment situation. He tried to excuse that seeming excessiveness by claiming that there simply had been a mistake—that the first Record of Counseling was intended to be a counseling. Yet, he hand-circled "Written Warning" on that Record of Counseling. That was a completely unnecessary action, given the line on Record of Counseling to the left of those quoted words in which he had placed an "X." There was no need to emphasize the discipline being administered, by also circling "Written Warning." The fact that Greco admittedly had done so, of itself, tends to objectively refute his testimony about some sort of mistake. Indeed, Respondent has presented no evidence whatsoever that any employee ever received two written warnings on the same day, at the same time.

The fact that he hand-circled those words on both Records of Counseling is significant in another regard. Doing so provides emphasis, impressing upon the recipient the implication of those Records of Counseling. That is, it highlights to the employee the control which her employer can exercise over her continued employment—that Respondent can take disciplinary action against her should she continue engaging in concerted protected activity which displeases Respondent. Indeed, Respondent has presented no evidence of any other Records of Counseling on which Greco had added circles to the discipline being administered through them.

Case had been the only employee disciplined on September 9 for events which had occurred on September 4. Singling out only one employee is hardly evidence of a lack of improper motive—because others identified as having communicated with coworkers about an employment term had not also been disciplined. An unfair labor practice is not excused by an employer's failure to go the whole 9 yards and disciplining everyone who engaged in statutorily protected activity. See discussion and citations, *Handicabs, Inc.,* supra, 318 NLRB at 897–898. If anything, disciplining only Case tends to show that Respondent believed that it needed only to discipline a single employee to accomplish the objective of deterring further communications among employees about employment terms and conditions.

The fact that *Handicabs* involved union discrimination, under Section 8(a)(3) of the Act, makes its above-referenced discussion no less applicable to situations where discipline is alleged to have been motivated by interference, restraint or coercion with concerted activity which the Act protects. One, no less than the other, seeks to accomplish a purpose unlawful under the Act: "making an example of" an employee, *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954), both as a retaliatory matter and, also, to achieve an "*in terrorem* effect on others," *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971).

Therefore, a preponderance of the credible evidence fails to show that Respondent had a legitimate reason for issuing a written warning to Case for inaccurate "disparaging remarks" made to Marshall. Rather, a preponderance of the credible evidence establishes that the first Record of Counseling did,

and was intended to, interfere with, restrain and coerce Case and others who learned about its issuance in the exercise of rights guaranteed employees under Section 7 of the Act, in violation of Section 8(a)(1) of the Act. That conclusion leads to consideration of the identical allegation directed to the second Record of Counseling issue to Case on September 9.

At the outset, Respondent concedes that, under its progressive disciplinary policy, Case would not have received a written warning for her Farley-related remarks had she not received the above-concluded unlawful Record of Counseling. Consequently, to that extent, issuance of written warning for the Farley-related remarks, standing alone, violates the Act, because the quantum of discipline which it imposes would not have been so great, hadthe unlawful other Record of Counseling not been issued to Case.

Beyond that, a number of factors support the General Counsel's threshold showing that Respondent's motive for issuing that second written warning had independently been Case's involvement in communications with other employees about a perceived unsatisfactory employment term. Respondent, through Greco, knew about that involvement on Case's part. On September 4 Greco displayed hostility toward employees, including specifically Case, for engaging in such activity, as described in section II, above. In the course of doing so, Greco engaged in conduct—coercive interrogation and threats of possible discharge—which constituted unfair labor practices. As concluded above, Respondent also resorted to unlawful conduct on September 9, issuing a Record of Counseling to Case because of her statutorily protected activity of communicating with coworkers about a perceived unsatisfactory employment term and, in turn, conduct which Marshall might take to obtain redress for loss suffered as a result of it.

Instead of establishing legitimate motive for issuance of the Farley-related Record of Counseling, Respondent's evidence serves to fortify a conclusion that it had been aimed at further impressing upon Case, and other employees who learned about it, that Respondent did not view favorably communications among employees about employment terms and, moreover, was not reluctant to make effort to deter it through resort to its disciplinary procedure. Of course, no testimony was provided by Allan for her asserted decision to issue the written warning to Case as a result of the Bob's Tavern event. That left Greco to supply an explanation for the warning.

He conceded having been aware that Case had been but one of a number of employees involved in the "we fired Gary Farley party." Despite his assertions about the seriousness of what had occurred there, and of its supposedly adverse consequences for Respondent, he admitted that he had made no effort to even learn the identities of other employees present during that "party" at Bob's Tavern. Yet, had remarks at it actually led to the "dissension" asserted in the Record of Counseling issued to Case, seemingly Respondent would have wanted to at least identify others involved in communications at Bob's.

Of course, Allan could have believed that a Record of Counseling issued to Case would suffice to warn others, given the ongoing spread of rumors at Respondent. But, Allan never appeared as a witness to advance such a defense. Nor was it advanced by Greco or any other official of Respondent. Certainly, I am not at liberty to supply a defense for Respondent which it has not advanced. See, e.g., *Norris/O'Bannon*, 307 NLRB 1236, 1242 (1992), and cases cited therein.

The fact that Respondent displayed no seeming concern about who, in addition [to] Case, had been involved in making remarks about Farley at Bob's is, itself, an objective indicium of statutorily-proscribed motivation. For, it tends to reveal a lack of interest by Respondent not only concerning who else may have been involved in asserted misconduct, but also is some indication of lack of interest in whether misconduct even had occurred. See, e.g., *W.W. Grainger v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); *NLRB v. Gogin*, 575 F.2d 596, 601–602 (7th Cir. 1978); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 48 (9th Cir. 1970). Similarly, Greco's failure to pay any seeming attention to Case's undisputed explanation, during the September 9 disciplinary meeting, that she had been told by a supervisor that Farley had been fired, also, evidences a lack of interest in whether misconduct occurred. Further, disregard of Case's explanation tends to show an intention to accomplish some objective other than discipline for a legitimate reason—to show that the Record of Counseling was being issued for other than a disciplinary one.

No support exists for the sometimes meandering testimony advanced by Greco. His description of a supposed report by Pletsch about supervisors becoming concerned about getting fired, arising purportedly from what had been said by Case and others at Bob's, was not corroborated by Pletsch, though the latter appeared as a witness for Respondent. In fact, there is no evidence of any supervisor other than Pletsch having become aware from Roe and his group about what had occurred at Bob's Tavern earlier during the evening of September 7. Nor were any supposedly concerned supervisors identified and, further, not one supervisor testified to having become concerned over reports about what may have been said during a "we fired Gary Farley party." Neither Roe nor any other member of his group from Bob's appeared and corroborated Greco's hearsay assertion that one or more of them had "complained to" Pletsch about was had been said by Case and Respondent's other employees at that "party."

Respondent concedes that it has no rule regulating off-site communications among its employees. So far as the evidence shows, the comments at Bob's had been made among Respondent's employees and not to third parties. That is, the employees' communications at Bob's Tavern had merely been overheard, at least so far as the record discloses. As stated in section I, supra, Greco was not a generally a credible witness. In connection with the Records of Counseling issued to Case on September 9, as discussed above, his testimony objectively serves to illustrate the unreliability of his accounts. Inasmuch as Allan did not testify, and as Greco's testimony is not reliable, there is no credible evidence of a legitimate reason for having issued those written warnings to Case.

"[T]he Board has found to be protected employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions." (Citation omitted.) *Polynesian Hospitality Tours*, 297 NLRB 228 fn. 2 (1989). Given Case's uncontroverted testimony about having been abused by Farley and, perhaps more importantly,

her complaints to supervisors about it, which surely supplies evidence of knowledge by Respondent regarding how Case felt about Farley, it can hardly be disputed that, while working for Respondent, Farley's conduct had "an impact" on Case's working conditions. Whether or not a "we fired [the supervisor] party" is the type of celebratory activity protected by Section 7 of the Act is a question which needs not be addressed here.

The ultimate issue is whether the second written warning issued to Case had been motivated by legitimate concern or, alternatively, by an effort to retaliate against her for having discussed with Marshall and other employees dissatisfaction with a particular employment term—not being allowed to work and not being paid, after having been scheduled to work—and having made suggestions concerning what course could be followed by Marshall to obtain explanation of the propriety of what had occurred on Labor Day, as well as possible redress for any impropriety. As concluded above, Respondent has presented no credible evidence of legitimate reason for having issued that second written warning to Case. The General Counsel has presented evidence which supports the allegation that the warning had been aimed at retaliating against Case for her statutorily protected activity and at deterring continuation of that activity. Viewed in its totality, therefore, the second, as well as the first, written warning had resulted from a motive which interferes with, restrains, and coerces employees in the exercise of statutorily protected rights, thereby also violating Section 8(a)(1) of the Act.

IV. EMPLOYEES' ACTIONS IN THE WAKE OF THE SEPTEMBER 4 CONFRONTATIONS

Greco's September 4 confrontations with Marshall, Gantz, and Case became a subject of breaktime communications and discussions among Respondent's employees, not surprisingly in view of the spread of rumors among employees described by Greco. At least some of them opined that Greco had not acted properly. For example, Gantz testified, "Well, we were concerned about the way the whole situation was handled. We didn't feel we should have been treated that way because it was handled in the middle of the casino in front of customers," and, similarly, Marshall testified that there had been communications among employees about "the way that Gordie reacted on the floor was not right, that it was making all of us scared to work, and that it was creating a hostile work environment." That last point by Marshall should not simply pass unnoticed.

Those concerns led some employees to pursue two courses: one within Respondent and the other outside of Respondent. As to the latter, Soole attempted on September 8 to contact Richard Sturgeon, a workers rights advocate. That attempt proved unsuccessful on that date and she left a message for him to contact her. As discussed below, eventually he made contact with her and his ensuing conduct is urged as a basis for unfair labor practices which Respondent directed against Soole.

With regard to the first course of action pursued by Respondent's employees, on September 9 Soole went to newly appointed Director of Security David Brown. By virtue of having become the occupant of that position during July, he was one of Respondent's two EEO Officers, the other being then-Director of Human Resources Allan. Once she received the two Records of Counseling on September 9, Case made her own visit to Brown.

Apparently, neither Soole nor Case realized at that time that Respondent viewed creating a generally hostile work environment as not sufficient to create an EEO violation, absent evidence that hostile acts were being aimed at a protected class. Still, from Soole's and Case's descriptions of what had occurred on September 4, Brown apparently became concerned that Greco might have been targeting female casino employees for abusive conduct. So, he and Allan set out to investigate what had occurred that day in the casino. Eventually drawn into that investigation would be another official, Lew Reddo, from Argosy's headquarters in Alton, Illinois.

The investigation disclosed that Greco's belligerence had not been aimed at a protected class, but had been directed at all casino employees, male and female. Respondent then abandoned further pursuit of Soole's and Case's EEO complaints. However, that investigation has independent significance to one allegation made in the complaint, as amended. For, it is alleged that, during the investigation, Brown and Allan had unlawfully threatened that employees would be subjected to discipline if they discussed with anyone their participation in the investigation.

During the afternoon of September 9, and over the course of succeeding days, Brown and Allan met with a number of casino employees. For example, Soole and Case were interviewed separately on September 9. It is uncontested that each was told that her identity as a complainant would be kept confidential. Brown testified that, in addition, he had told each of them, as well as others that were later interviewed, that "what they would tell us would be kept between us, and we asked them to maintain that same level of confidentiality, not to go back to the boat and discuss what we had asked them and what they had told us," because if they did so, "it had the potential to hinder the investigation." At no point did Brown testify that he or Allan had made any threats of discipline should an employee disregard those confidentiality requests.

For the most part, employees who testified corroborated that testimony by Brown. For instance, Gantz testified, "They told me not to discuss it with anybody. They said they weren't—nobody would know that I had been there because they weren't telling anybody and I was not to discuss it with anyone because they wanted to keep it quiet so they could conduct their investigation." Gantz testified expressly that she had been instructed not to discuss '[t]he incident or the investigation itself" with anyone. In like vein, Marshall testified that Brown had asked her "not to say anything for fear of harming the confidentiality of it—or—and to keep from hindering the investigation," and, moreover, that Allan had said, "I wasn't to say anything to keep from hindering the investigation and the confidentiality of it." Similarly, Case testified that, "They said that this was an EEO investigation that was completely confidential, I was not allowed to discuss it with anyone." She also pointed out specifically, when asked if she had been told not to discuss "that matter which the investigation was ongoing," that, "That is not exactly the way it was phrased. I was told I should not discuss the investigation"—presumably, as opposed to being told not to discuss the underlying incident being investigated.

As pointed out in section II,B., above, communications among employees about an employment term are protected by Section 7 of the Act and, moreover, one such employment term is conduct by "a supervisor who has an impact on [employees'] working conditions." *Polynesian Hospitality Tours,* supra. At first blush, consequently, it might seem to have been a violation of the Act for Brown and Allan to request or instruct that employees not discuss the incident—Greco's belligerent conduct—and the investigation of that incident. But, that would be too superficial a conclusion in the circumstances of such an investigation. Activity ordinarily protected by the Act can lawfully be restricted by employers who "demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

Here, Respondent had received separate complaints from two employees about a supervisor's conduct. Although those complaints did not truly involve harassment based upon gender, there is no basis for concluding that Brown and Allan had understood as much at the time that Soole's and Case's complaints had been received, nor during the initial phase of the ensuing investigation. To the contrary, complaints by two female employees against a male supervisor, describing supervisory conduct which also involved two other female employees, surely supplied a logical basis for suspecting that female employees were being singled out for abuse.

If so, that would be a serious situation for an employer and one which public policy seeks to prevent from occurring. In consequence, public policy favors full investigation of charges of workplace sexual harassment: both to root it out, if it is occurring, but also to clear a supervisor of baseless accusations of sexual harassment.

It is a long-recognized fact-finding technique—arising from the Biblical account of Susanne and the Elders—to separate witnesses who ostensibly will be describing the same event, to uncover discrepancies among their accounts and, thus, possible fabrication. 6 Wigmore, *Evidence* Sec. 1837 (3d ed. 1940). Separation "prevent[s] the possibility of one witness shaping his testimony to match that given by other witnesses." *U.S. v. Leggett*, 326 F.2d 613, 613 (4th Cir. 1964), cert. denied, 377 U.S. 955 (1964).

To be sure, Respondent's investigation of Soole's and Case's complaints did not rise to the level of a formal proceeding. Nonetheless, the above-noted public policy favoring rooting out sexual harassment in the workplace, as well as the corollary policy of clearing falsely-accused supervisors, would seem to warrant a conclusion that care should be exercised when conducting such investigations—to be certain that a proper conclusion is reached. Accordingly, some leeway should be accorded for use of long-recognized fact-finding techniques, such as separation of potential witnesses. Therefore, I conclude that a legitimate purpose did exist for requesting, even instructing, interviewed employees not to discuss the incident giving rise to the complaints being investigated.

A legitimate purpose also existed for requesting or instructing that employees not discuss the investigation, itself. Obviously, discussion of the latter could alert not-yet-interviewed employees about information being sought, thereby risking the possibility that those employees might tailor their accounts to Brown and Allan either to support the complaints or, should an employee not agree with Soole's and Case's position, undermine them. After all, Soole and Case had gone to Respondent with their complaints. Certainly it can be presumed that they wanted a proper and uncompromised investigation to be conducted.

Were no more involved here than what had been described above—a request or instruction not to discuss the incident and investigation—further consideration would not be warranted concerning the allegation based upon that request or instruction. But, one employee did give testimony about a threat of discipline which assertedly had accompanied Brown's and Allan's request or instruction. If uttered, it might be concluded that such a threat so tainted the accompanying request or instruction that the totality of what had been said violated Section 8(a)(1) of the Act, though as it turns out, however, that is not an issue which needs be reached.

The employee who supplied the testimony about an accompanying threat is Marla Soole. As stated in section I, supra, Soole was not always a credible witness. She is an alleged discriminatee who, consequently, had something to gain—backpay and reinstatement—should it be concluded that Respondent had unlawfully terminated her on December 10, not to mention having unlawfully disciplined her on prior dates. See, e.g., *Standard Precision*, 311 NLRB 33, 36–37 (1993). Further, as described in section V,A, below, Soole was chastised by Pavone in connection with her statements about a planned Spring Hula Mula promotion. That seemed to have given rise to resentment by her against Pavone. Having observed her as she testified, I have no doubt that such resentment could lead Soole to tailor accounts so that they would portray Respondent in a light most unfavorable to it, thereby indirectly disadvantaging Pavone, its general manager. Even so, it did not seem that she was always being less than candid as she testified; it did appear that she was being truthful at some points. Still, Soole's accounts must be evaluated with caution.

One objective illustration of Soole tailoring her testimony arose in connection with her description of her interview with Brown and Allan. When testifying, she claimed that she had been told not to discuss "the incident with Gordie" or "the investigation [of it] with any of my fellow employees *or anyone on the outside.*" (Emphasis added.) and, further, if caught "discussing it in any way with anyone that I could receive discipline up to an including termination." Of course, that testimony differs dramatically from the above-described accounts of other interviewed employees.

Moreover, Soole's above-quoted account began to unravel when she was confronted, during cross-examination, with her prehearing affidavit. In it, she made no mention of anything having been said about "anyone on the outside." Rather, her account in the prehearing affidavit states only, "We were not to discuss it with our fellow employees while the investigation was ongoing or we could be disciplined ourselves." Asked about omission in the affidavit of "anyone from the outside," Soole claimed that she had not remembered that statement when her affidavit had been taken. Yet, that seems unlikely. As discussed further below, in the affidavit she stated that she had told Brown and All "that I had sought outside counsel."

Obviously, such "outside counsel" would be encompassed by an instruction not to discuss the investigation with "anyone from the outside." If she remembered the former when she gave the affidavit, it seems inexplicable that she would not have also remembered the latter—that she would not have remembered having been threatened if she communicated to, in effect, "outside counsel" what had occurred.

Turning to another contradiction between Soole's testimony and the account in her affidavit, Sturgeon was an individual with whom Respondent had become well-familiar by September 9, as discussed further below. Soole testified that, during her conversation with Brown and Allan that day, she had informed them that they "should be aware of the fact that we had also already contacted and sought outside counsel," adding, at counsel's suggestion, "I told her, yes. I told her that it was Dick Sturgeon's office." If so, that would mean that by the above-quoted supposed "anyone on the outside" instruction, Soole was effectively being warned not to discuss the investigation with Sturgeon.

In direct contradiction of that testimony about having named Sturgeon for Brown and Allan, however, Soole's affidavit recites: "I also told them at this time that I had sought outside counsel, *but I did not tell them who it was*." (Emphasis added.) Confronted with that statement from her affidavit during cross-examination, Soole lamented, "I'm not 100 percent sure" about having told the investigating agent that she had said, during the interview with Brown and Allan, that she had already contacted Sturgeon. Yet, by the time that she had given the affidavit, Sturgeon had become a rather central figure in the adverse events which Soole had experienced. Soole is a talkative individual and, given that trait, it is difficult to believe that she would not have mentioned to the investigator having told Brown and Allan about Sturgeon, if she, in fact, had said to anything about him to those two officials. Certainly it strains credulity to believe that the investigating agent would have simply ignored a description by her, of having mentioned Sturgeon to Brown and Allan, instead writing in her affidavit "I did not tell them who it was." Beyond that, it is difficult to accept that Soole, a seemingly perceptive individual, would have signed an affidavit containing such a now-asserted misstatement.

Allan did not appear as a witness. So, the record lacks any denial by her of having threatened Soole, or of having heard Brown do so. Brown never denied that Soole had been threatened with discipline if she talked about the investigation with her coworkers or with anyone from the outside. However, absence of contradiction does not automatically render credible the testimony which is not contradicted. See, e.g., *MDI Commercial Services*, 325 NLRB 53, 60 (1997), now pending before the United States Court of Appeals for the Eighth Circuit, and cases cited therein. "The hospital seems to assume that testimony that is not specifically contradicted must be believed; this in incorrect." *Kasper v. Saint Mary of Nazareth Hospital*, 135 F.3d 1170, 1173 (7th Cir. 1998).

In sum, over time Soole provided "evolving versions," *Arnold v. Groose*, 109 F.3d 1292, 1296 (8th Cir. 1997), of what had been said during her meeting with Brown and Allan. See also, *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1053 (9th Cir. 1998). Her explanations were unconvincing about the omissions from her affidavit of statements which she claimed when testifying had been made. Beyond that, she was the only employee who attributed disciplinary threats to Brown and Allan. Yet, some of those other interviewed employees—Marshall, Gantz, Case—had been more centrally involved than Soole, a mere observer on September 4, in the incident which was being investigated. As an objective matter, it makes no sense for Brown and Allan to have singled out Soole for disciplinary threats, without having directed threats to other employees whom those two officials interviewed on and after September 9. I do not credit Soole's testimony about her interview with Brown and Allan.

Therefore, there is no credible evidence to support the allegation of threats having been uttered by Brown or Allan during their interviews with employees. True, they said "anyone" when requesting or instructing employees not to discuss the incident or investigation of it. But, there is no evidence that, by "anyone," either official had been referring to anyone other than employees. In fact, Brown testified that he had said not to do so when the interviewee went "back to the boat," a statement which appears to clearly be confined to personnel employed by Respondent. The above-quoted explanations which accompanied the requests or instructions, as related by Gantz, Marshall, and Case, would naturally leave the impression that Brown and Allan were referring to Respondent's personnel, not other people. Certainly, no employee, other than Soole, testified to having inferred that Brown or Allan had meant outsiders, such as counsel or employee advocates.

As concluded above, there was a legitimate purpose for Brown and Allan to have requested or instructed that employees being interviewed not discuss with other personnel the incident or the investigation of it. That purpose was communicated by those two officials to at least some employees, as Gantz and Marshall acknowledged. Therefore, I conclude that the General Counsel has failed to present credible evidence supporting the allegation that Brown or Allan had made threats which violated Section 8(a)(1) of the Act.

Turning back to a subject raised earlier in this section, Soole had unsuccessfully attempted to telephone Sturgeon on September 8. As to how her effort to do so had come about, after September 4 employees had been discussing actions they might take to secure protection from what they perceived as abusive supervisory treatment. For example, Case testified that she and Soole had advocated forming "a group" to which Respondent might pay more attention than it did to individual employee-complaints. So far as the record shows, those discussions were conducted openly during breaks and, moreover, no less openly in the breakroom and on port side deck smoking area than had been discussions of Greco's September 4 conduct.

When she had worked for another employer, Winnavegas, Gantz had taken some of her employment-related problems there to Sturgeon. He is a workers rights advocate who is president of an organization called Workers Have Rights Too." That organization is no stranger to the Board. See *Schaeff Inc.,* supra, 321 NLRB at 205. Nor, as of the beginning of September, had that organization and Sturgeon been strangers to Respondent. Sturgeon had previously filed unfair labor practice

charges against Respondent. One had led to issuance of a complaint which was eventually settled before hearing. Further, Pavone acknowledged that he and Sturgeon had met "at a local hotel" in an effort "to resolve the issue" of asserted problems which Sturgeon had listed in a letter to Respondent.

Although she had been the employee who had dealt previously with Sturgeon, Gantz did not want to take the lead in contacting him during September. So, Soole did. As mentioned above, she telephoned his office on September 8, but Sturgeon was not there. She left a message for him to call her. He eventually did so. On a day during the week of September 15 to 19, but possibly as early as September 10, 11 or 12, he met with Soole, Gantz, Case, and probably Marshall. At that meeting the employees explained their situation. Sturgeon promised to contact them after having formulated a plan of investigation and action. By letter to those four employees, dated October 1, he sent them a copy of a "SURVEY FORM" which would appear in the Sioux City Journal newspaper scheduled for publication on Sunday, October 5. By then, however, Soole had been suspended for 3 days, from September 24 through 26.

As will be seen in section V, below, there can be no question that by late November Respondent had become aware of Sturgeon's involvement with its employees and, also, of Soole's involvement with Workers Have Rights Too. It appears to have been in an effort to supply evidence of earlier such knowledge, of her involvement with that organization, that Soole was led to testify that she had identified Sturgeon during her investigative meeting with Brown and Allan. As it turns out, that unreliable effort was not actually needed.

A showing of employer knowledge of employees' statutorily protected activities is not confined to direct evidence—that is "evidence, which if believed, proves existence of fact in issue without inference or presumption." *Rollins V. TechSouth, Inc.*, 833 F.2d 1525, 1528 fn. 5 (11th Cir. 1987). See also *Woodson v. Scott Paper Co.*, 109 F.3d 913, 930 (3d Cir. 1997); *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). "This 'knowledge' need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." (Citation omitted.) *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). Accord: *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir. 1980); *Webco Bodies, Inc. v. NLRB*, 595 F.2d 451, 454 (8th Cir. 1979); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994). Indeed, a showing of actual knowledge is not even essential for the General Counsel to prevail. For, "the Act is violated if an employer acts against the employees in the belief that they have engaged in protected activities." *Henning & Cheadle, Inc. v. NLRB*, supra. Accord: *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 90 (8th Cir. 1965); *Handicabs, Inc.*, supra, 318 NLRB at 897.

Several factors collectively serve as a basis for inferring that, by September 20, Respondent had known or, at least, suspected that Soole had become involved with Workers Have Rights Too. By then, Greco clearly knew that Sturgeon had become involved with Case. In a memorandum to Allan, dated September 20, he complained that, "Michelle Case continues her disparaging remarks to her co-workers" and, further, that Case "continues to create dissention [sic] by recruiting personnel to pursue the advice of Dick Sturgeon and Workers Have Rights Too." Obviously, the memorandum dispels any doubt about knowledge as of September 20 that Sturgeon had become involved with one of Respondent's employees.

The fact that he named Case, but not Soole, as the employee "recruiting personnel" for Sturgeon and his organization does not necessarily mean that, as of September 20, Greco had been unaware that other employees were also "pursu[ing] the advice of Dick Sturgeon." Greco never claimed that, as of that date, he had not been aware that employees, such as Soole, in addition to Case had become involved with Workers Have Rights Too. Obviously, such a denial cannot be supplied on his behalf. *Norris/O'Bannon,* supra. Indeed, the fact that Greco stated, in the memorandum, that Case had been "recruiting personnel to pursue the advice of" Sturgeon is, itself, some indication that Greco knew by September 20 that employees beside Case were becoming involved with Workers Have Rights Too.

Greco acknowledged that, throughout his tenure as casino manager, he had been aware that Case and Soole were friends. Thus, viewed from his perspective, it would be natural for Soole to be supportive of Case's activities. In fact, Case and Soole had been the two employees who had filed the EEO complaints which Brown and Allan had been investigating since September 8. Certain[ly] Allan knew that.

More importantly, Greco conceded that he had heard "hearsay" about Respondent's employees talking about Sturgeon and Workers Have Rights Too. Further, Greco admitted knowing who had been involved in those hearsay reports and that Soole had been one of them. At no point did Greco limit his acquisition of that "hearsay" knowledge to some date after September 20. And there is no basis in the record for inferring that Greco would likely not have heard of Soole's involvement with Sturgeon until some date after he had learned of Case's "recruiting personnel" to follow Stugeon's lead.

Soole testified that, during breaks, she had openly told other employees that she intended to contact Sturgeon and, in addition, had invited those employees to support her efforts, through Sturgeon, to secure corrections of what she perceived to be unsatisfactory employment terms and conditions. Although, as pointed out above, Soole had not always been candid when testifying, Case testified that she, Soole, Gantz, and Marshall had discussed their September meeting with Sturgeon both among themselves and, also, with other employees. Those conversation had occurred mostly in the break room, though some took place on the port side smoking area. Both of those locations are frequented by supervisors, as well as by employees. Soole and Case did not claim that they had made any effort to conceal from supervisors what they were saying about trying to work out their employment difficulties through Sturgeon. Beyond that, it seems logical that Soole and Case would have spoken to coworkers about Sturgeon. After all, if they were to accomplish anything, support of as many employees as possible would be needed by Sturgeon.

As Greco acknowledged, rumors circulate freely among Respondent's employees. Contacting an organization such as

Workers Have Rights Too was not seemingly an ordinary occurrence at Respondent. So, as some employees learned what Soole and Case were doing, it was natural that contacts with Sturgeon likely would become a subject of discussion among Respondent's employees. In turn, rumors generated by those communications among employees would naturally percolate up to Respondent's supervisors. Thus, the "hearsay" reports which Greco admitted having heard.

V. SUSPENSIONS AND DISCHARGES OF MARLA SOOLE

A. Introduction

Marla Soole began working for Respondent as a dealer on January 17, 1995. Thereafter she worked continuously in that capacity until discharged finally on December 10. During those almost 3 years of employment Soole was disciplined only once. That occurred on January 23, 1996, when she was counseled for having made an improper payout 5 days earlier.

Conversely, the three performance evaluations which she received—during 1995, 1996, and 1997—each rated her overall performance as "Meets Expectations" and she received her pay increases as scheduled. In addition, she twice was voted employee of the month[5] and once was runner-up for employee of the year. Regardless of the circumstances leading to her election as employee of the month, by her coworkers, her nomination for employee of the year, it is not contested, had been made by a group of department managers.

In addition, it is uncontroverted that Greco had made several commendatory comments to Soole prior to Labor Day. For example, he never denied having asked her and three other employees, during the summer of 1996, to upgrade their licenses , so they would be available to replace the pit manager should the latter become ill. During August, a month before her first suspension, Greco did not deny having offered concert tickets to Soole, saying that because she "was such a positive employee, he considered [her] to be an asset to the company." In fact, Greco had written on Soole's 1997 performance evaluation: "possiBLE Advancement to SUPERVISOR [sic]."

The fact is, however, that Soole had resented Greco's attitude and treatment of employees. While she had no apparent personal conflicts with him, Soole resented his treatment of other employees. She was not reluctant to complain to General Manager Pavone about her opinion of Greco's conduct. "Several," he testified, times Soole had complained to him about Greco. However, she had been the only employee willing to do so—a fact which Pavone pointed out to her during at least one conversation between them about Greco.

Soole did not confine her comments to Pavone to the subject of Greco. During the almost 3 years of her employment by Respondent she made ongoing suggestions to Pavone about how she felt operations could be improved. For the most part Pavone accepted her suggestions without objection, though by the time that he testified he expressed criticism of her ongoing negative attitude. He also claimed that other employees had complained to him about Soole's and Case's continuing expressions of dissatisfaction. But, he never identified any supposed complaining employees. Nor did any appear as witnesses to corroborate that testimony by Pavone.

Pavone's relations with Soole appear to have soured as a result of an incident during the spring of 1997. Soole had been present by the end of a marketing meeting during which a Hula Mula promotion was being discussed. It is not worth discussing this incident in too much detail. Suffice to say that either she inaccurately reported to other dealers that they would be included in that promotion or, alternatively, that she complained to other dealers that they were being excluded from participation in the promotion, while other employees were being included in it. Either way, hard feeling resulted. Pavone became upset with Soole over what she had told other employees. He criticized her. She became antagonistic to him as a result of that criticism.

There is no evidence that Soole became a target of any retaliatory action by Respondent as a result of the Hula Mula contretemps. The point of the foregoing descriptions, however, is that prior to September Soole had confined her complaints to Respondent's nonsupervisory and supervisory, especially Pavone, personnel. The theory of unlawful motivation proceeds upon the basis that during September, for the first time, so far as the record shows, Soole took her complaints to an outsider, Sturgeon, as described in section IV, above.

B. Suspension of Soole from September 24 through 26

Four days after Greco had written his September 20 memorandum to Allan, he summoned Soole to a meeting. During that meeting, she was informed that she was being suspended for 3 days. The General Counsel alleges that the true reasons for that suspension had been retaliation against Soole for filing the EEO complaint against Greco and, also, for at least suspected contacts with Workers Have Rights Too. In addition, it is urged that Respondent sought to deter further contacts with Sturgeon by Soole and, as well, by other employees who learned about her suspension.

The Record of Counseling recording her suspension states that, on September 13, Soole had "breached company security and violated Argosy Internal controls along with her departmental policies by going into another pit area relieving another dealer without the authorization of her shift MGR [sic]." It warns that, "Failure to comply with this counseling may result in more severe disciplinary action being taken up to and including terminatioN [sic]."

In fact, Soole acknowledged that on September 13 she had relieved another dealer, Desiree Rosenbaum, without the authorization of her shift manager, Sprague. However, she further testified that she had done no more on that date than dealers had been doing for some time. To better understand this

[5] During cross-examination, Respondent attempted to cast some doubt on the validity of election as employee of the month as an analytical factor. Indeed, from Soole's own answers, it does seem that dealers had made efforts to vote in a fashion that would ensure election of one of their own number each month. Yet, regardless of events underlying Soole's elections as employee of the month, those elections were treated by Respondent as a factor favorable to her when evaluating performance: "Past Employee of the Month" was written on her 1996 evaluation and "Employee of the Month Nov. 96" was written on her 1997 evaluation.

situation, some understanding is needed of Respondent's procedure for providing relief for dealers during their shifts.

On September 13 Case and Rosenbaum had been dealing craps at the same table. To provide its dealers with 20-minute breaks approximately every hour, Respondent ordinarily assigns dealers in four-person teams. Craps, for example, are dealt by a four-person team of dealers. One starts the shift on break, while another starts the shift as stickperson. The other two dealers start the shift as base persons, each one being responsible for what occurs at an opposite end of the table. After 20 minutes elapses, the dealer on break relieves one of the dealers who has been working. After finishing her/his break the relieved dealer returns to the table and relieves one of the two dealers who has not yet had a break. That rotation continues throughout the shift. The dealer who takes the shift's final break had been allowed to leave for the day as of September 13, not needing to remain until shift's end.

By way of completeness, dealers for other games, such as blackjack and roulette, are also grouped into teams of four, one of whom starts the shift on break. Break relief follows the same rotation as the craps team. The only difference is the relieved dealer returns to the table from which she/he was relieved and the relief dealer then moves to the table of another member of the team. Thus, in contrast to craps, dealers for other games remain at the same station throughout their shifts, save for break periods when replaced by the relief dealer on the team.

Teams of dealers are scheduled by the shift manager before a shift begins. A copy of that schedule is submitted to the surveillance department, so that it can maintain a list of names and games of the teams and their members. In that way, surveillance can monitor who is dealing which game—determine which dealer is responsible for any mistake and, beyond that, determine if a particular dealer is involved in rigging a game. The surveillance department accomplishes that by means of cameras which are focused on the dealers' hands and on the tables. Thus, the reason for the schedules of which dealer's hands are involved in a particular game at a specific time.

On September 13 Rosenbaum had a problem. Because of a babysitting conflict, she needed to pick up her child at 7:10 p.m., 10 minutes after her shift was scheduled to conclude. She would not have enough time to reach the babysitter if she remained until [the] shift's scheduled end. So, she and the other dealers on her craps table team arranged Rosenbaum's schedule that day to allow her to take the final break, thereby being able to leave for the day at 6:40 p.m. Respondent does not contend that, in doing so, those dealers had engaged in any impropriety.

Their intentions in that regard were frustrated by unanticipated increase in Respondent's business during the early evening of September 13. Shift Manager Sprague decided to open three more blackjack tables. Given the timing of Rosenbaum's last break, Sprague decided to assign Rosenbaum to Blackjack Nine table for the remaining 20 minutes of the shift, at which point the swing shift dealer would take over dealing at Blackjack Nine. As a result, when she was relieved at 6:40 p.m. Rosenbaum and Floor Supervisor Ebaugh went through the process needed to open a blackjack table, in that case Blackjack Nine.

Afterward Soole's swing shift craps replacement dealer arrived for work at approximately 6:50 p.m. Observing Rosenbaum dealing at Blackjack Nine, rather than leave work, Soole went to that table and tapped out Rosenbaum, saying as she did so that Rosenbaum could go to pick up her child.

Soole had not obtained Sprague's, nor Ebaugh's, authorization to replace Rosenbaum, though there is no evidence that the latter had been aware that she was being replaced without authorization. Ebaugh was opening one of the remaining two blackjack tables at the time. When he looked up and noticed Soole dealing at Blackjack Nine, he testified that he believed something peculiar had occurred, because it meant that three dealers—Rosenbaum, Soole, the swing shift dealer—would be dealing one game within a quite short period of time. He did not dispute Soole's testimony that when he asked her where Rosenbaum had gone, Soole replied that Rosenbaum had to pick up her child and that Ebaugh said merely "okay."

Ebaugh testified that after the shift had ended on September 13, and he had brought up to speed the swing shift floor supervisor, he asked Sprague if she had told Soole to replace Rosenbaum. Sprague said she had not done so and, in turn, asked if Ebaugh had made that replacement assignment. He denied having done so. Of course, by that time Rosenbaum had left and so, also, had Soole. Accordingly, when she prepared her end-or-the-day report for Greco, Sprague wrote on it that rather than going home after being tapped out on craps, Soole "relieved Desi on BJ," though not authorized by Sprague to do so. She then transmitted that document to Greco's office and left for the day.

Ordinarily Greco would have seen that report later on September 13 or during the following day. But, he was not in Sioux City at that time, though as he testified Greco advanced his own evolving versions about the length of his absence. During direct examination he testified initially that he had left Sioux City on September 11, returning "one week from then, the 18th." "I believe my first day back to the office was the 19th," testified Greco at that point. Moreover, with regard to Brown and Allen's EEO investigation, Greco claimed, "I probably toward the end of September was called over and was asked about what happened" on September 4. Given the undisputed testimony that Brown and Allan had been trying to keep confidential the subject of their investigation, and the fact that it had been Soole and Case who had filed complaints which led to it, Greco's "end of September" testimony would tend to show that it was not likely that he had been alerted that he might be the target of that investigation until after Soole had been suspended on September 24.

His absence from Sioux City also tends to supply some explanation for why it had taken 11 days to discipline Soole on September 24 for an asserted impropriety occurring on September 13. That is, assuming, as he claimed during direct examination, that Greco had not returned to work until September 19, there is a plausible explanation for Greco's testimony that paperwork had piled up during his somewhat prolonged absence and that it had taken him some time to notice and react to Sprague's September 13 report. Greco's above-described testimony, however, did not hold up during his subsequent examination about his absence from Sioux City.

In the first place, Brown testified that he and Allan had interviewed Greco on September 17—2 days before the "first day back to the office" testimony advanced by Greco during direct examination. Thus, not only was that testimony not corroborated, but it was directly contradicted by Director of Security Brown's testimony. And the evidence left no room for dispute about the accuracy of the date provided by Brown: that it had been September 17—not "toward the end of September"—when Greco was interviewed in connection with the EEO complaints. Thus, by September 24 Greco had to have known that he was a target of that internal investigation.

Secondly, as his testimony progressed, Greco eventually conceded, "yes, I was back [in Sioux City] on a Wednesday, the 16th" of September, thereby contradicting his own above-quoted earlier assertion that not until "the 19th" had he been "back to the office" after September 11. That means, obviously, that his paperwork backlog upon return had not been so great as he had initially portrayed it and, more significantly, meaning that there had been 3 extra days—from September 16, not "the 19th" of September—to discover Sprague's September 13 report and, then, to investigate what is reported in it about Soole.

Those discrepancies in Respondent's defense are not necessarily fatal to its acceptance, nonetheless, given the importance of surveillance knowing who is dealing which games, Soole's concession that she had not been authorized to tap out Rosenbaum on September 13, and Soole's work schedule which included 2 days off between September 16 and 24. Fatality did emerge, however, from review of Respondent's evidence about the events supposedly leading to the decision to suspend Soole for having replaced Rosenbaum without authorization.

Greco claimed that he had not been involved in that decision. He testified that after learning from Director of Surveillance Galle that there still existed a tape showing Soole replacing Rosenbaum on September 13, and after obtaining written accounts from Sprague and Ebaugh about what had happened that day, he (Greco) submitted that information to the human resources department. Greco further claimed that he played no further role in events until Galle "came down to my office and told me that I was to suspend Marla Soole for breach of company security." Respondent presented no evidence explaining why a director of surveillance would be communicating disciplinary decisions to a manager of another department.

General Manager Pavone also took himself out of the loop in connection with the decision to suspend Soole on September 24: "I believe I knew about it after the fact," and, "The first one [suspension of Soole] was implemented. I believe I knew about it the next day." If those accounts by Greco and Pavone were reliable, that would mean that the decision to suspend Soole had made by some unknown person—perhaps Allan, perhaps Galle in light of Greco's above-quoted testimony. But, Galle gave testimony which obliterated the foregoing disavowals of Greco and Pavone.

Galle first testified for Respondent before either Pavone or Greco had done so. During that initial appearance Galle made no mention whatsoever about having participated in the sequence of events leading to the decision to suspend Soole on September 24. After Pavone and Greco had appeared as witnesses, with the latter testifying that he had been told by Galle to suspend Soole, Galle was recalled as a witness for Respondent.

During has second appearance Galle did corroborate Greco's account about the latter having asked if the September 13 surveillance tape still existed, showing Soole tapping out Rosenbaum. Further, Galle testified that he had located that tape. Then, testified Galle, "Mr. Pavone, Kathy Allan and Mr. Greco and myself were—we talked about it and Mr. Pavone of course asked me if I had ever seen this before. I said no, I've never seen a dealer take it upon themselves to tap out another dealer." If nothing else, that testimony by Galle contradicts Pavone's above-quoted denials of having known about Soole's unauthorized replacement of Rosenbaum until "after the fact." It also contradicts Greco's testimony that he had no involvement between submission of information to the human resources department and supposed receipt of Galle's message to suspend Soole.

Asked who had informed Greco about the disciplining Soole, Galle contradicted Greco's above-described account that he had been told by Galle to suspend Soole. "I believe it was Kathy Allan," testified Galle, who had done so. Galle continued, "I think we were either together or we were on the speaker phone at the time and I was in the office because I was part of the investigation team." Galle never claimed that that speaker phone conversation had been one separate from the conversation during which "Mr. Pavone, Kathy Allan, and Mr. Greco and myself . . . talked about" what had occurred on September 13.

As pointed out above, Allan was never called as a witness. In consequence, the record is devoid of any testimony by her as to what she may have told Greco and as to her reason(s) for what she may have said to Greco, if anything. Beyond that, if she actually had been the decision-maker, that would mean that Soole's role as EEO-complainant would have been known by that time to the official who had decided to suspend Soole for three days. For, she was one of the two officials conducting investigation of that complaint, as well as of the one filed by Case. Beyond that, it had been to Allan that Greco had directed his September 20 memorandum concerning the "dissention" being caused by Case's contacts with Sturgeon. Greco concluded that memorandum by asking Allan for "insight you can give me on the situation", and he never denied that Allan had done so. Accordingly, it is likely that he also would have communicated to Allan his admitted knowledge of Soole's, as well as Case's, involvement with Workers Have Rights Too. Certainly, Greco never denied having done so.

Greco prepared a Record of Counseling which he issued to Soole during a meeting on September 24. Analytically, the substance of what had been said during that meeting is less important than two aspects of the discipline imposed that day. First, Soole was given a 3-day suspension without pay, even though Respondent's progressive disciplinary policy provided for suspension only after an employee had been counseled and, then, issued a written warning for earlier infractions. Of course, Soole had not been disciplined for 20 months prior to September: on January 23, 1996. Under Respondent's policy, prior discipline so remote, from an event for which discipline

was being administered, would not have counted in calculating the quantum of discipline to be imposed.

Second, Respondent made an effort to explain that seemingly excessive level of discipline by pointing to the purported significance of Soole's September 13 tap out of Rosenbaum. As quoted above, the Record of Counseling prepared by Greco accuses Soole of having breached company security and of having violated Argosy's internal controls and departmental policies. At first blush, based upon Respondent's evidence concerning surveillance's need to know who was dealing where at all times, there would appear to be some logic to accusing Soole of having undermined security. After all, she had replaced another dealer without obtaining authorization to do so and, further, without any record existing that she, not Rosenbaum, was dealing at Blackjack Nine from approximately 6:50 to 7 p.m. on September 13. But, facial logic can sometimes be misleading.

Although given the opportunity to do so, Respondent's witnesses were unable to point to any written rule, policy or internal control which prohibited employees from doing what Soole had done on September 13: relieving another dealer without authorization to do so. Yet, Respondent had, and has, relatively extensive and detailed written rules, policies and internal controls. Given their existence, were unauthorized replacement of another dealer so serious as Respondent began portraying it after September 13, then surely some written prohibition of unauthorized replacement would have been included somewhere in those rules, policies, and internal controls, especially given the now-asserted importance to surveillance knowing who was dealing for each game.

The absence of such a written prohibition, itself, is of some significance in evaluating the true reason for Soole's September 24 suspension. Further, it may well have been the absence of any written prohibition on tapping out another dealer without authorization which left the dealers believing that there was nothing wrong with what Soole had done on September 13. And not all other dealers perceived any impropriety in what Soole had done.

Marilyn Raymond, an alleged discriminatee who had occasionally served as a floor supervisor,[6] testified that occasionally craps dealers had relieved blackjack dealers. But, she further testified that a dealer could not simply relieve another dealer who wanted to leave work a few minutes early, without first being authorized by the shift manager to provide that relief. Beyond that particular type of situation, however, practice at Respondent was not so supportive of its now-asserted defense that unauthorized replacement of a dealer had been an obvious and serious violation of its rules, policies and internal controls.

[6] Despite that occasional service as floor supervisor, the amendment to complaint alleged that Raymond had been an "employee" and Respondent took no issue with that characterization. Nor has Respondent contended, independently of that Amendment, that Raymond had been other than a statutory employee. Given the absence of such a contention and the, in effect, judicial admission resulting from the absence of denial that Raymond had been an employee, there is no reason to pursue analysis of whether Raymond's sometimes service as floor supervisor had somehow deprived her of the status of employee within the meaning of Sec. 2(3) of the Act.

Soole testified that there had been situations when business was slow and some tables had not yet opened, leaving unoccupied dealers who were scheduled to deal at those tables. According to Soole, those dealers—denominated "extra" dealers—would be "told by our supervisors just go ahead and give a push, and when that happens you just randomly broke dealers on games that we were familiar with." True, those extra dealers were taking action on the basis of supervisory authorization. Yet, if they were "randomly" replacing dealers, then obviously there would be no written schedule showing which dealers were being relieved and the identities of the dealers who had randomly replaced them. Accordingly, the surveillance department would not know the identities of dealers who had randomly replaced others.

Of course, as concluded above, Soole was not always a candid witness; she was sometimes tailoring her testimony to buttress her case against Respondent. However, other dealers essentially corroborated Soole's account of extra dealers occasionally picking and choosing which dealers to tap out for breaks. For example, instead of breaking one of the dealers on teams to which she had been assigned, "[o]n more than one occasion," Marshall testified, she would see that "all three dealers that were at my tables were new" and she "would go over to the other pit, give a push at the craps table and never think a thing of it, entering the pit without checking first to make sure I could give a push at craps." "It never occurred to me that I should" first check with the floor supervisor, testified Marshall.

Similarly, Case testified that, sometimes when she had been a relief dealer and sometimes when she had not been, she would "break another dealer in another pit, or break[ ] a dealer out of rotation," without authorization to do so. And Rosenbaum testified that during mornings when business was slow, "if I went up from my break to go break my tables, and everybody else had just come back, too, then I would go pick someone who had been standing there 20 minutes or 40 minutes or however long, in a different pit, and go break them."

To be sure, none of the foregoing testimony attributed to Respondent's supervision specific knowledge of what Marshall, Case, and Rosenbaum had been doing. However, Respondent maintains fairly close watch over what goes on in the casino, through watchfulness by floor and shift supervisors and through its surveillance cameras. As mentioned above, surveillance cameras monitor the games. But, others monitor a broader spectrum of casino activities—else, Galle would not have been able to locate a tape showing Soole replacing Rosenbaum on September 13. Given that degree of watchfulness, it seems unlikely that every instance of unauthorized replacement of dealers would have escaped notice—that Respondent could have been totally unaware of unauthorized replacements prior to September 13.

In fact, at one point Ebaugh gave testimony tending to support that of the dealers: "Extra dealers you tell them you do a break in Joe's rotation, you do a break in Pete's rotation. *You let them have that option of which one of the two tables* they are going to break." (Emphasis added.) Accordingly, there is some direct evidence that at least one of Respondent's supervisors—and one of the two involved in floor supervision on September 13—had been allowing dealers to pick and choose

which dealers to replace for breaks. And the tenor with which Ebaugh advanced that testimony tended to show that he did not regard as extraordinary what he was allowing dealers to do—that he seemed to believe that, in allowing them to pick and choose which dealers to replace, he was describing a practice which comported with Respondent's ordinary practice.

The crux of this situation is not that Respondent did not prepare schedules of dealer teams for each shift and, following those schedules, did not provide a usual order for providing relief for dealers on those teams. Clearly, Respondent did so. Instead, the crux of the foregoing testimony is that, viewed from their perspective, dealers were left with no explicit prohibition on occasionally relieving dealers not included on their scheduled teams. Both supervisors patrolling in the casino and surveillance would likely have known that unscheduled replacement of dealers was occurring. Yet, nothing was done to prevent it prior to September 24. To the contrary, Ebaugh had been suggesting it.

There is one other element which the General Counsel relies on to support the allegation involving Soole's September 24 suspension, as well as for an independent allegation that Section 8(a)(1) of the Act had been violated. Once the hearing opened, a motion was made to further amend the complaint, by adding an allegation that Security Shift Supervisor Beth Poss, an admitted statutory supervisor and agent of Respondent, had unlawfully threatened unspecified reprisals against employees because of the latter's statutorily-protected activities—by telling employees to watch their backs because Greco was watching security tapes of certain employees. Aside from denying that allegation, Respondent objected to the amendment on the ground of prosecutorial misconduct by counsel for the General Counsel and on the added ground that basing a violation upon whatever Poss may have said was barred by the 6-month limitation period in Section 10(b) of the Act.

Prosecutorial misconduct is a term of art, not some sort of generalized characterization of every impropriety by a government attorney. See *U.S. v. Stands*, 105 F.3d 1565, 1577 (8th Cir. 1997). Here, Respondent points to counsel for the General Counsel returning a telephone call to Poss, whom some prehearing affidavits characterized as a supervisor, without first notifying Respondent's counsel that the call was being returned. Making such a call in those circumstances, urges Respondent, violated Section 10056.6 of the Agency's Casehandling Manual, as well as the American Bar Association's Model Rules of Professional Responsibility. That may be, but those matters lie outside the ambit of subjects which I can consider.

"The casehandling manual is not binding on this court or the NLRB." (Citation omitted.) *Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998). Parity of reasoning would appear to govern any impropriety under the Model Rules of Professional Responsibility. There is no evidence that anything done by counsel for the General Counsel "prejudicially affected the [Respondent]'s substantial rights so as to deprive [it] of a fair trial." *U.S. v. Stands,* supra. Therefore, it serves no purpose to further discuss the conduct of counsel for the General Counsel, especially as there is no credible evidence of conduct by Poss which violated the Act.

Turning to discussion of that, Case testified that shortly after the September 4 incidents, she had been having a cigarette on the port side when Poss came along and said, "Watch your back, he is watching you." When she asked what Poss meant, testified Case, Poss replied, "Gordie just had a picture taken of Charlie and I [Poss] and Tommy Thompson standing by your table in the casino," but, "Don't worry about it, I have written a two-page disclaimer and Tommy Thompson wrote a page and a half. But watch your back." Case made no mention of Soole having been present when Poss delivered that warning.

Moreover, Case acknowledged that Poss had been referring to an incident when, contrary to Respondent's rules, Poss and others had been standing and chatting at the gaming table where Case was working, though no customers were then playing there. Case never claimed that they were discussing the EEO complaint, Workers Have Rights Too, Greco's conduct, unsatisfactory employment terms, nor engaging in any other activity there which is protected by the Act. "There can, of course, be no violation of [Section] 8(a)(1) by the employer if there is no underlying [Section] 7 conduct by the employee." *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997). Therefore, no violation of the Act can be based upon the remarks by Poss to Case.

Not one to be left out, Soole also testified to remarks made to her by Poss. But, Soole placed those remarks as having been made on September 24, before she had been summoned to the office where she received the 3-day suspension for what she had done on September 13. In her prehearing affidavit, but not when she testified, Soole had stated that Poss had made her remarks to "Michelle and I". According to Soole, Poss had said "that I had better watch my back because Gordie was in surveillance watching specific tapes on specific things and he must be looking for something so I'd better watch my back."

Soole made no mention, neither in her affidavit nor when testifying, that Poss had referred to any tapes of activities by Soole which the Act protects. In fact, inasmuch as Respondent's surveillance tapes are not shown to have an audio component, there seemingly would be no way for Greco to ascertain, merely by watching tapes, whether Soole was discussing Workers Have Rights Too or employee dissatisfaction with employment terms on any occasion, particularly in the breakroom. At best, all he could ascertain was that Soole was talking to coworkers. Yet, the record discloses that employees commonly communicated with each other about a variety of subjects in the break room. Just looking at tapes would hardly reveal discussion by Soole with other employees of subjects encompassed by the Act. Thus, even had Poss said that to Soole, her statements do not constitute some form of surveillance nor impression of surveillance of Soole's statutorily protected activities.

The theory seems to be that Poss's statements left Soole to later infer, as a result of what occurred to her thereafter that same day, that Greco had been looking at tapes to locate evidence that Soole had tapped out Rosenbaum on September 13, thereby buttressing the assertedly legitimate reason for a Record of Counseling actually motivated by retaliation for Soole's activities protected by Section 7 of the Act. Regardless of the merit of such an argument, there is no need to address it here.

It seemed to me that Soole's testimony was being advanced as another effort by her to put her thumb on the scale and further her case against Respondent. While testifying Soole made no mention of Case having been present when Poss uttered the asserted warning. Yet, in her prehearing affidavit Soole had placed Case there. Soole offered no explanation for that discrepancy.

True, Case did testify about a warning made to her by Poss. However, that warning had been made to Case almost 3 weeks earlier. More significantly, it had pertained to an incident unrelated to Sturgeon and Workers Have Rights Too, as well as being unrelated to any of the statutorily protected activities in which Case had been involved. I do not credit Soole's testimony about the supposed warning to her by Poss. Rather, it seems that, on learning what had been said to Case by Poss, Soole merely adopted it as a basis for advancing her own case against Respondent. In sum, nothing said by Poss to employees, so far as the credible evidence shows, violated Section 8(a)(1) of the Act.

Regardless of any remarks attributed to Poss, other evidence establishes that Respondent had suspended Soole from September 24 through 26 in violation of Section 8(a)(1) of the Act. As a result of communications among employees about perceived mistreatment by Greco, Soole had taken the initiative in contacting Sturgeon for assistance with that employment condition, and perhaps with others as well. From prior incidents Respondent knew that Sturgeon focused on perceived unsatisfactory employment conditions. Greco admitted having known that, in addition to Case, Soole had become involved with Sturgeon. By then, Greco had already demonstrated his hostility toward employees discussing employment terms and conditions. As concluded in section II,B, above, he was not reluctant to resort to unfair labor practices—coercive interrogation, threats of possible discharge—to identify the employees involved and to deter continuation of those communications among Respondent's employees. In addition, as concluded in section III, above, unlawful written warnings were issued to Case on September 9. One of those warnings specifically singled out Case's involvement in statutorily protected communications with coworkers and characterized those communications as causing dissension.

Interestingly, Greco used that same term, albeit misspelled, when learning of Case's involvement with Sturgeon: in his September 20 memorandum to Allan. Use of that term in that memorandum obviously demonstrates Greco's antagonism toward Sturgeon and Workers Have Rights Too. Beyond that, there is no evidence showing that Allan, who had received that memorandum, did not share Greco's view of Sturgeon and his organization. To the contrary, to the extent that Greco can be believed, it had been Allan who had made the decisions to issue the unlawful written warnings to Case. Given those decisions, it is likely that Allan shared Greco's view of employees' contacts with Sturgeon to improve what they regarded as unsatisfactory employment terms. Inasmuch as Allan had agreed that communications among employees should be regarded as causing dissension, it seems likely that she would have viewed similar communications with Sturgeon, about the same subject, as an equal display of causing dissension.

There are added factors which should be considered in evaluating Respondent's actual motive for suspending Soole on September 24. Of course, issuance of that Record of Counseling to Soole is the same type of conduct to which Respondent had resorted on September 9 when it unlawfully pursued the same course to retaliate against Case and to deter her from further communications with other employees about employment terms. To be sure, written warnings were issued to Case, while Soole was suspended. If anything, however, Soole was the more highly regarded of those two employees, at least as of the beginning of September. To suspend the latter for a first-time offense, while only issuing written warnings to the former, only heightens suspicion about Respondent's disciplinary actions.

Not only had Soole received seemingly satisfactory evaluations and raises for 3 years, but she had been twice elected employee of the month. Based upon one of those elections, Respondent's department managers had included her as one nominee for employee of the year. While she did not win, she was a runner-up for that distinction. On her 1997 evaluation Greco had suggested that she was an employee worthy of consideration for promotion to supervisor. As late as a month before suspending her, it is uncontested that Greco had praised her as "a positive employee" and as "an asset to the company."

The fact that two intervening disciplinary steps were skipped over to suspend so exemplary an employees is, standing alone, some basis for suspicion regarding Respondent's actual reason for suspending Soole on September 24. Certainly, an employer can lawfully bypass steps of its disciplinary program where there is evidence of aggravating circumstances. See, e.g., *Children's Mercy Hospital*, 311 NLRB 204, 204–205 (1993). However, it is not possible to conclude that aggravating circumstances exist where the asserted offense is conduct tolerated by an employer in the past. See, e.g., *Ace Cab*, 301 NLRB 119 fn. 1 (1992).

The evidence hardly shows that unscheduled dealer replacements had been occurring with regularity at Respondent. Still, Soole, supported by three other employees, testified that ad hoc dealer replacements had occurred prior to September 13. Indeed, admitted statutory supervisor and agent of Respondent Ebaugh admitted that dealers occasionally been allowed the "option" of selecting dealers for breaks. The fact that such unscheduled relief was being allowed by a supervisor is further evidence that Respondent had not rigidly been following a practice of prohibiting one dealer from replacing another particular dealer without prior authorization to do so. In fact, the absence of any written rule, policy, or internal control prohibiting such unscheduled replacement casts further doubt on Respondent's assertions that such replacements were not allowed.

Ebaugh's admitted "option" practice shows that Respondent had not been insisting that dealers rigidly follow daily schedules when selecting employees to be replaced. So, too, does the fact that surveillance cameras would have recorded unscheduled replacements. It seems illogical that, given the evidence of occasional unscheduled and unauthorized replacement of one dealer by another, at least one instance of an unscheduled replacement would not have been detected in the surveillance department. A contrary conclusion would mean that surveil-

lance personnel were not doing their jobs—a conclusion not warranted by the evidence presented.

In sum, the evidence supports a conclusion that the General Counsel has satisfied the burden of showing that Soole's concerted activities protected by Section 7 of the Act had motivated her suspension from September 24 through 26. In contrast, to satisfy its burden of presenting evidence of legitimate reason for that suspension, regardless of any concerted protected activities by Soole, Respondent presented testimony which was internally contradictory and inconsistent—testimony that, as an objective matter, simply cannot be accorded reliance in reaching the ultimate conclusion concerning the actual reason for the suspension. Responsibility for the decision to suspend Soole cannot be fixed. Greco denied that he had been involved in making that decision. Inferentially, so also did Pavone who claimed that he had not known about the suspension until "after the fact." Those denials were contradicted by Director of Surveillance Galle who testified that both Pavone and Greco had been involved in discussions of the September 13 incident before the suspension decision had been reached.

Galle also contradicted Greco's testimony that he had been told by Galle to suspend Soole on September 24. Not only did Galle not corroborate that testimony, but he placed Greco as having been present when the suspension decision had been made and attributed that decision to Allan. In a seeming effort to distance his role from any connection to the EEO complaint filed by Soole, Greco claimed that not until "the end of September" had he been interviewed and realized that his conduct might be the target of that investigation. That testimony was contradicted by that of Director of Security Brown. Further, Greco's seeming effort to explain the delay from September 13 to 24 in disciplining Soole led him to advance a chronology concerning his absence from Sioux City from which, eventually, he was forced to retreat by agreeing to facts which contradicted his initial chronology.

As mentioned in section I, above, Pavone and Greco did not appear generally to be testifying candidly. The evidence described in this section illustrates their unreliability in connection with the September 24 through 26 suspension of Soole. I do not credit the testimony advanced by Respondent to support its assertion of legitimacy for that suspension. In light of that conclusion and in view of the evidence supporting the allegation that the suspension had been motivated by activity by Soole protected by Section 7 of the Act, I conclude that a preponderance of the evidence shows that Soole was suspended to retaliate against her for having become involved with Sturgeon, in an effort to obtain correction of a perceived unsatisfactory employment situation, and to deter her and other employees from continuing to seek relief through Workers Have Rights Too. Therefore, the September 24 through 26 suspension of Soole violated Section 8(a)(1) of the Act.

C. Suspension of Soole from November 4 through 6

In the October 5 edition of the Sioux City Journal there appeared a "SURVEY FORM" which Sturgeon had prepared, as a result of his September meeting with Soole and her coworkers, discussed in section IV, above. The form solicited certain information—name, address, telephone number, hire date, and last day of work, and reason for departure—from former employees of Respondent. Sturgeon also had sent a letter to the Iowa Racing and Gaming Commission, the State agency which regulates Respondent's casino operations. Respondent's officials never denied having learned about the newspaper solicitation and the letter to the Commission. In fact, all things considered, it seems unlikely that publication of such a survey form in Sioux City's newspaper would escape Respondent's notice, particularly given the "rumors, rumors, rumors, rumors," as Greco put it, which circulate throughout the boat. Certainly publication of such a form can hardly be characterized as a usual occurrence, at least not in the context presented here.

After those early October events, things were relatively quiet for the remainder of the month on the Workers-Have-Rights-Too-front. Even so, there is no evidence that Soole had abandoned interest during October in having Sturgeon assist employees in correcting or mitigating unsatisfactory employment conditions, as perceived by Soole and some other employees. More importantly, there is no evidence that Respondent had any indication from which its officials could conclude during October that Soole had abandoned further contacts with Sturgeon and his organization. Certainly no official of Respondent testified that he/she had concluded during October that Soole had abandoned Sturgeon and Workers Have Rights Too.

On November 4 Soole was again suspended for 3 days, from November 4 through 6, as a result of an incident which had taken place on October 31. The Record of Counseling issued in connection with that suspension states, in pertinent part, "InsuBORDiNATion towARD supervisors—MARLA refused to acknowledge that she reported to work w/out AN ApRon. MARLA circumvented dept. policy, interrupted anotheR DePT MGR conducting an interview with a potential employee, stating 'I WANT TO BUY An Apron so they can't write me up' [sic]." Written in the "Performance expectations and specific actions employee must take" portion are that Soole must report to work in uniform and "refrain from disruptive conduct with other depts."

As part of their uniforms, dealers are required to wear aprons, to cover clothing pockets into which chips or money can be slipped during games. When she reported for work on Friday, October 31 Soole discovered that she had forgotten to bring her apron. So, also, had dealers Kham Vangnuluth and Floyd Woods. Soole testified that, before the shift began, she had borrowed an apron from Mark Solheim at the podium. As it turns out, three officials were involved in the ensuing events that day: Brad Ebaugh, who testified that he had been shift manager on October 31; Mark Solheim, who testified that he had been assistant shift manager that day and, in addition, apparently manager on duty; and, Mike Christianson, table games floor supervisor or floor person on October 31.

An objective illustration of Ebaugh's general unreliability arose in connection with testimony which he gave, tending to contradict Soole's testimony that she had borrowed an apron from Solheim before her shift had begun on October 31. For, as to events that day, Ebaugh advanced evolving versions of what had occurred. During cross-examination, as questioning progressed concerning the reason for Respondent's concern about the apronless Soole, Ebaugh abruptly claimed, for the

first time, that on October 31 Galle had come to him (Ebaugh) and had reported that there were dealers not wearing aprons: "he came to me and I went to Mark [Solheim] because he was the shift manager." Yet, Ebaugh already had testified, at the beginning of direct examination, that he (Ebaugh) had been shift manager that day. And Solheim earlier testified that on October 31 he had been, "Assistant shift manager."

During cross-examination, and, then, during redirect and recross examinations, Ebaugh added to that account advanced initially during cross-examination: that Galle had reported to him (Ebaugh) about dealers being present without aprons. Ebaugh added that, after Galle's supposed report, he had gone to Solheim and had "told him, you know, we got to get aprons on these dealers and he took a couple and I took a couple and told them to—." Asked if those apronless dealers actually had been dealing at the time of Galle's purported report, Ebaugh answered, "I assumed they were, yes," a somewhat surprising answer given his testimony that he and Solheim had taken aprons to those dealers. Surely he knew what the dealers had been doing at the time when he supposedly had given his "couple" aprons to wear. It also raises the question of why, were dealers actually dealing without aprons, he or Solheim had not observed them doing so, without having to be assertedly alerted by Galle about their lack of aprons. Of course, his evolving accounts made the story more onerous for Soole and other purportedly apronless dealers.

Pressed for a description of how aprons assertedly been distributed to those dealers, Ebaugh reversed field, in the process advancing vague and uncertain answers. By way of illustration, asked about having himself taken aprons to dealers, as his above-quoted answer at least implies that he had done, Ebaugh responded, "I do not know exactly how I conveyed to them that they had to get an apron but I did." Asked again if those dealers had been dealing or getting ready to deal when he had spoken to them about being without aprons, Ebaugh answered, "I honestly don't recall. Probably it means like I might have said something to them in the break room but I'm not sure of that," and, asked subsequently if he remembered anyone who actually had been dealing when he had spoken to that person about no apron, Ebaugh responded, "No, I really don't remember particular incidents." Even so, he asserted that Soole must have been dealing without an apron—which, of course, portrayed her in an unfavorable light, for having begun to deal without wearing an apron: "I'm sure she was on the floor of the casino without one or Mike wouldn't have told me that she was on the floor of the casino without one or Mike wouldn't have told me that she was on the floor of the casino but I'm assuming that. I don't know."

Galle never confirmed any aspect of Ebaugh's above-described evolving sequence of events: never testified that he had seen any apronless dealers on the casino floor on October 31 and, moreover, never testified to having gone to Ebaugh to report that dealers were on the casino floor, much less dealing, without aprons. Nor did Solheim corroborate any aspect of that evolving description which Ebaugh ended up advancing. Instead, consistent with the above-described testimony of Soole, Solheim testified that "right at 11:00 when she reported to work," Soole had come "up to me. She said she forgot her apron, and I got one out of the podium and gave it to her." Thus, Solheim contradicted any assertion about having to chase down Soole to give her an apron.

Solheim's testimony also, at least, tended to contradict Ebaugh's claim of having to chase down other dealers to give them aprons. In the first place, Solheim described only two other dealers who had reported on October 31 without aprons: Vongnalath and Woods who, testified Solheim, "came up and said they forgot their aprons." In the context of the foregoing testimony, Ebaugh's account of what supposedly had occurred simply cannot be accorded any reliance as a basis for a finding of facts as to what had taken place on October 31.

Once the games opened on October 31, Solheim testified, "I got documentation forms out and wrote . . . three different ones for each person that they had come to work without an apron, and that I was loaning them one." Solheim further testified that the text of what he had written on all three forms had been essentially "identical"; he characterized the forms as, "More of a receipt than anything else." But, that testimony was not wholly accurate.

As will be seen below, Solheim would later on October 31 discard the form prepared for Soole. However, Respondent retained the ones prepared for Vongnalath and Woods. Consistent with Solheim's testimony, the wording on them is essentially identical. But, that wording shows that the forms seemingly represented something more than merely "a receipt." The forms for Vongnalath and Woods both state that should the recipient report for work again without an apron, she/he may be sent home until able to report for work in complete uniform. Surely those words partake more of warning, than of simple receipt. If truly no more than a receipt had been involved, there would seem no need to add such a warning. And neither Solheim nor any of Respondent's other witnesses explained why such a warning would have been added to what Respondent characterizes as no more than a receipt.

Furthermore, while Respondent's witnesses contended that such "receipts" are destroyed upon return of the borrowed uniform item, the fact is that as of the hearing Respondent still possessed the receipts issued to Vongnalath and to Woods. Its officials speculated that maybe they had been retained because neither of those dealers had returned the borrowed aprons. If so, however, seemingly that would have been relatively easy to demonstrate: by calling one or both of them to explain the fate of the borrowed apron(s).

Beyond that, if Vongnalath or Woods, or both, had not returned the borrowed apron(s) then, as discussed below, Respondent would have levied a charge for the apron(s), in which case seemingly there would have been some documentation of those charges. Presumably, once the cost of the apron(s) had been deducted—remembering that, by the time of the hearing, over half a year had passed since those aprons had been borrowed, during which time surely such deduction would have occurred—there would have been no need to retain mere receipts for those borrowed aprons.

Conversely, if those "receipts" also had been intended as warnings, for reporting to work without complete uniforms, then there obviously would have been purpose for retaining those two documents: Respondent would later be able to produce and point to what those documents said, should Vong-

nalath or Woods—or Soole, had she signed the form—reported for work after October 31 without a complete uniform. Regardless of Respondent's actual intention, as an objective matter, an employee asked to sign such a document would have some logical basis for suspecting that, by the form as written, she/he was receiving at least a mild form of disciplinary warning. And considering what had occurred at Respondent during the preceding month—coercive interrogation and threats of possible discharge directed at employees for engaging in concerted protected activities, unlawful written warnings issued to Case for her involvement in those activities, and, most particularly, unlawful suspension of Soole—such suspicion would only be heightened.

Once the form for Soole had been prepared, Solheim told Christianson to take it to her for signature. Soole's and Christianson's accounts of their ensuing conversation do not altogether conform. Yet, the discrepancies are no more than collateral, since their accounts do correspond to the extent that Christianson told Soole that she had to sign the form and she refused to do so because she did not want another "write up" on her record. Instead, Soole told Christianson, she would rather incur the cost of purchasing a new apron from Respondent's guest services department. Christianson testified that he then had "informed my supervisor that she didn't want to sign it." In fact, Christianson continued on to testify that he had reported Soole's refusal to sign the documentation form both to Solheim and to Ebaugh. Christianson never explained why, in light of the fact that only Solheim had given him the form for Soole's signature, he had bothered to also report Soole's response to Ebaugh, a seemingly uninvolved supervisor from the events as related by Christianson.

Ebaugh testified that he did later speak to Soole about not having signed the documentation form: "after some time when she wouldn't sign the . . . slip for borrowing the apron," he testified, "I told her that, you know, why not sign it. It doesn't mean anything," but "she said she didn't want her name on any documentation documents."

Although, as set forth above, she had told Christianson that she would purchase a new apron, Soole made no apparent immediate effort to do so. Instead, still wearing the apron borrowed from Solheim, Soole went to the breakroom. Solheim joined her there, intending to discuss the situation. Again, there are differences between her account and his account of what had been said. But, again, those differences are mostly collateral. For, both accounts show that after Solheim pointed out that she would have to sign the document if she intended to continue wearing a borrowed apron, she took it off, handed it back to him and picked up one lying on the breakroom table, saying that now she had an apron. When she said that, testified Soole, Solheim "took the write-up and he tore it up right in front of me," after which, "He threw it away." That action by Solheim, at that point during the day, should not simply pass without some further comment.

Solheim claimed that whenever people reported for work without part of a uniform, and needed to borrow that uniform part, it had been practice to loan the needed item and have the borrowing employee sign a receipt for it: "To my knowledge. Ever since I became a shift manager I had to have everyone sign for them. Days, swing." Then, he further testified, when the borrowed uniform part was returned, the receipt would be discarded. But, if the borrowed item was not returned, then the receipt was forwarded to, eventually, payroll so that the borrowed item's cost could be charged to the borrowing employee. Solheim's testimony about that practice was corroborated by Ebaugh and by Christianson. It also was corroborated by alleged discriminatee Raymond.

Thus, based upon the testimony of Solheim described in the preceding paragraph, there is logic underlying Soole's above-described testimony that Solheim had torn up and thrown away the documentation form after she had returned the borrowed apron to him. Indeed, he initially testified that he had told her, in the breakroom, that the documentation form "wasn't a write up. It was a receipt that she was going to wear one of my aprons," but that when she took the apron from the table and returned the borrowed one, "since I had my apron back I just—I don't know if—I didn't really care. I had my apron back," and, "I threw away the write-up." But, during cross-examination, Solheim appeared to be trying to do a little placing of his own thumb on the scale: trying to portray the situation, and Soole's role in it, in a more advantageous light for Respondent and in one less advantageous for Soole.

Asked at that point why he had torn up the documentation form for the apron loaned to Soole, Solheim then testified, "I was frustrated." At receiving back an apron loaned to Soole? Well, no. Solheim earlier had testified that he had not become frustrated until after it later was discovered that the apron taken from the table by Soole had belonged to another dealer—Mark Phonechanh—who needed it to perform his duties. Yet, by that point on October 31, Solheim testified, as described in the preceding paragraph, that he already had thrown away the documentation form pertaining to the apron which Soole had borrowed from him. Thus, there should have been no relationship between throwing away that form and purported frustration arising from discovery that Soole needed to return the apron which she had picked up from the table.

Solheim did continue to agree that Soole would not have needed to sign the documentation form if she was able to get an apron somewhere other than from him. But, he amended his earlier testimony, during cross-examination, as to why he had thrown away the documentation form which he had prepared for Soole on October 31, by claiming that Soole's return of the borrowed apron, based upon picking up one from the table, had been only "part" of his reason for having discarded the documentation form. He never did explain precisely what the other "part" was, for having discarded that form. Presumably, he was attempting to portray his purported frustration at having to come back to Soole a second time on October 31 about the apron situation. If so, however, Solheim's assertion of frustration obviously could not pertain to his reason for having discarded the documentation form—that occurred before he had to return to Soole about the apron that she had picked up from the table.

As stated above, the apron taken from the breakroom table by Soole had belonged to dealer Phonechanh who, discovering that it was missing from the table, apparently had gone to Solheim. Both Soole and Solheim testified that the latter ap-

proached Soole, apparently on one of her succeeding October 31 breaks, although that is not altogether clear. Solheim told her that she needed to give back to Phonechanh the apron she was wearing. Again, he offered to allow her to borrow an apron from him if she was willing to sign a documentation form for it. She again declined, saying that she would rather purchase a new one than sign what she regarded as another "write-up."

Soole testified that, at that point, Solheim went into the men's locker room to search unlocked lockers for an apron that she could wear. According to Soole, he brought one out for her to wear. "And so I gave him the dealer Mark's apron back," she testified. Solheim denied that he had gone to the men's locker room and gotten an another apron for Soole, perhaps because he viewed such a concession as somehow diminishing his frustration assertion. If so, that was a mistake by Solheim. He did not dispute Soole's testimony that she had given back Phonechanh's apron. As discussed below, Respondent's own witness, Jean Nepple, testified that Soole had been wearing an apron later, when Soole had subsequently gone to guest services personnel to purchase a new apron. Obviously, Soole had gotten that apron from someplace. In this instance, there is no seeming reason for her to have tailored her testimony, as she appeared to be doing on some other occasions. Absent evidence identifying some other source from which Soole had gotten that apron—and none exists—Soole's account of Solheim having gotten her one from the men's locker room would appear to be reliable.

Solheim conceded that when Soole next returned to the casino, she had been wearing an apron. As to the events surrounding her having received that apron, Soole testified that after giving her the apron from the men's locker room, Solheim had left the breakroom, but she began thinking about it. She explained that she became "concerned about whose apron Mark had gotten out of the locker because I figured that if they [sic] didn't have an apron they [sic] were going to be in trouble," and, in consequence, "I chose to call guest services who was in charge of the uniforms at the time and I called over to Lisa McVay's office and I asked to talk to Lisa, and the gal who answered the phone said that she [McVay] was in an interview." McVay, the guest services manager, at least during October, was not called as a witness, even though, as will be seen below, her subsequent remarks to Greco were, according to him, a component of the sequence of events culminating in the decision to suspend Soole for her conduct on October 31.

The "gal who answered the phone" had been Jean Nepple, Respondent's marketing analyst by the time of the hearing, but the guest services supervisor on October 31. Nepple agreed that Soole had telephoned and testified that she and McVay had been interviewing a prospective employee at the time Soole's call had been received in McVay's office. So far as the record discloses, Soole could not have known, when she had placed the call, that McVay was interviewing an applicant.

Both Soole and Nepple testified that the former had asked about purchasing an apron and that Nepple had replied that she and McVay were conducting an interview, so Soole would have to contact a guest services representative. Soole then called Heather Morgan, one of the guest services representatives and another individual never called as a witness, though there was neither evidence nor representation that Morgan was not available to testify.

Soole testified that she asked Morgan if she (Soole) would be able to get an apron "now" and that Morgan responded, "Sure. I've got the time." In fact, there is no evidence that Soole's call and request had interrupted any activity in which Morgan had been engaging when she had received Soole's call.

Soole testified that when she located Morgan, the latter noticed that Soole was wearing an apron and inquired why Soole needed an apron. "I just need an apron," Soole testified that she had replied. Consistent with Soole's testimony, in her written recitation of what had occurred on October 31, submitted to Respondent the following day, Nepple wrote that "the apron [Soole] had was in bad shape, and Marla stated that it was an apron that she had found." Although the latter statement is ambiguous, it does not contradict Soole's testimony about having gotten the apron from Solheim, after he had found it in the men's locker room.

Morgan would have gotten an apron for Soole, without further involvement by McVay, had not a problem arisen. According to Nepple, uniform parts are kept in the dry storage room. To get into that room a key is needed. Morgan discovered that, to get an apron for Soole, she needed that key. So, Morgan went to McVay's office where a key was located. Nepple testified, "we hadn't expected Heather to come in during the time. We didn't think that she would come in during the interview, but we had kind of forgotten about the key." Yet, there is no evidence that it had been anything done by Soole which had led to Morgan's decision to enter McVay's office on October 31, thereby interrupting the interview then in progress there. So far as the record shows, that had been an unaided decision made by Morgan.

As to what happened in McVay's office, Nepple testified that, "Heather came in to the office," while Soole "was in the doorway. The hallway is right here. Lisa's desk is here facing out into the hallway." Then, according to Nepple, "Lisa spoke with Marla." So far as the record shows, had McVay not chosen to address Soole, the latter would have remained standing silently "in the doorway." As to the exchange which ensued after McVay had spoken to Soole, Nepple testified that McVay had said to Soole "that she would need to fill out a payroll deduction form just to charge her for the apron because the one she had at the time was so tattered that Lisa said that it wasn't replaceable [sic]." According to Nepple, Soole replied that she would "rather take the payroll deduction than receive the write-up that she was about to get." During cross-examination, Nepple testified that she could not remember any other conversation on that occasion.

Nepple did describe Soole's tone, when she made the above-quoted statement to McVay, as having been "irate" and as "a little bit snotty." Of course, there is no testimony by Morgan nor, more particularly, by McVay corroborating Nepple's opinion of Soole's tone. More significantly, there is no evidence that McVay had voiced any complaint to Greco about Soole's tone, nor even described that tone, when McVay spoke to Greco later that day. In consequence, there is no evidence that, in deciding to suspend Soole, decision-making officials had

been aware of Soole's asserted "irate" and "snotty" tone of voice when speaking to McVay.

Soole got the apron from Morgan and, Solheim conceded, was not on the casino floor again that day without an apron. Four days later, on November 4, Soole was given the above-partially quoted Record of Counseling and, as a result, was again suspended for 3 days. The testimony advanced in support of Respondent's defense, that the suspension had been imposed for legitimate reasons arising from the events of October 31, was sometimes uncorroborated, other times inconsistent, and not infrequently marred by gaps in evidence presented to support that defense.

Four documentation forms were presented in connection with that defense: one completed by Christianson, another completed by Solheim, a third completed by Nepple, and a fourth completed by McVay. Those forms set forth each official's description of what had occurred on October 31 and apparently constituted the totality of the information available to the decision-makers who decided to suspend Soole. As pointed out above, McVay did not testify. So, the only evidence from her regarding what she may have said to other officials is what is stated in the documentation form which she completed.

In that form, dated November 1, McVay recited that she and Nepple had been conducting an interview and that Soole and Morgan had come to the office "for the dry storage keys," after which McVay wrote, "I asked Heather who the apron was for," and when Morgan replied for Soole, "Marla came around the corner and I said Marla you already have an apron," to which Soole said, "I'd rather buy an apron than take the write up their [sic] going to give me." McVay's documentation-account continues by stating that after Soole said "she found" the "torn and tattered" apron which she was wearing, "I told her to stop back next week and sign the paper work [sic] because I was interviewing and I didn't have the time to get the forms."

There are three significant omissions from McVay's written report, given Respondent's defenses for Soole's November suspension. First, as pointed out above, McVay never wrote that Soole had been "irate" or "snotty" when she spoke with McVay. Second, the written account does not claim that Soole had initiated the brief exchange which occurred between her and McVay; to the contrary, McVay wrote that she had first engaged Soole in conversation about "already hav[ing] an apron". Third, most importantly, at no place in her written account did McVay state that Morgan's effort to get the key, nor anything said or done by Soole, had somehow interfered with ability to conduct the interview. Nor, as it turns out, is there any evidence that McVay had voiced any complaint concerning Soole and ability to continue conducting that interview.

Greco testified that, at approximately 4:45 p.m. on October 31, Ebaugh had "come to the office for something" and, while there, had mentioned, "Marla is—Marla is giving us a hard time over an apron in the casino." In fact, Ebaugh corroborated that testimony: "I mentioned to Gordie that there was a hullabaloo about the—about the apron, that there was—she wouldn't sign—she wouldn't sign the documentation form. She didn't want her name on it." Yet, concededly Greco took no action in immediate response to what Ebaugh had said, although his testimony about his response(s) pursued an ambling course, by now a familiar trait in Greco's testimony.

During direct examination, he testified that when Ebaugh had mentioned the "hard time" being given by Soole, he (Greco) had merely asked who was watching the casino, because Greco had been told that Solheim had to go downstairs and, obviously, Ebaugh was not at that point in the casino. Greco renewed that testimony initially during cross-examination: his only concern on October 31 had been with someone supervising in the casino. But, then he began supplying his own evolving versions of the comments which he and Ebaugh had exchanged.

Asked if the "apron-thing" had not concerned him at the time, Greco seemed to appreciate the effect on Respondent's defense of answering that it had not concerned him—the obvious inference which could be drawn from his answers to that point. Thus, he testified that, yes, he had at the time asked Ebaugh, "What do you mean," and Ebaugh had said, "she wouldn't acknowledge the form of the apron." Asked later how he had known to ask Christianson for a written account of the apron incident, Greco added a little more to his description of what had been said by Ebaugh. He claimed that Ebaugh also had said that Christianson had some information about what had occurred. Then, Greco further added that Ebaugh also had said that Solheim had been involved. By that point, Greco had extended his description of his conversation with Ebaugh well beyond what he initially testified had been said. In the process, he supplied elements to it which were not corroborated by Ebaugh's above-quoted description of what he had said to Greco on October 31.

After having spoken with Ebaugh on October 31, testified Greco, he had encountered McVay a few minutes later. He testified that "she said Marla was very upset and Marla needed an apron and I want you to know that she's got an apron," but, "I didn't fill out a payroll deduction thing. Make sure she gets—you get the apron back from her." Of course, such a last statement by McVay would have made no sense at all. No one contested that Soole had contacted guest services to *purchase* an apron. Obviously, from her written account, McVay had understood as much. So, there would have been no reason for McVay to tell Greco to "get the apron back from her." It also should not escape consideration that there is no evidence that McVay ordinarily informed Greco about employee-uniform purchases. Accordingly, it is somewhat puzzling that, within a short time after Soole had obtained the uniform, McVay would be speaking with Greco about that purchase. If she did so, there is no explanation for providing that information to Greco, since McVay was not called as a witness.

During cross-examination about McVay's October 31 statements to him, Greco again made some additions to the account which he initially had advanced. He added that McVay also had said that she was concerned that Soole had not filled out a payroll deduction form for the apron. For her to have said that would have made no sense. After all, in her written account, McVay stated that she had "told her to stop back next week and sign the paper work because I was interviewing and I didn't have the time to get the forms." If there is fault to be apportioned for no paperwork having been completed on October 31,

in connection with Soole's apron-purchase, it was that of McVay, not Soole. Certainly there is no evidence even tending to show that, after Soole had left the office, McVay had abruptly formulated some sort of doubt that Soole would not do what McVay had instructed her to do: stop back next week to sign the necessary payroll deduction for the apron's purchase.

Greco made a further addition during cross-examination to his description of McVay's remarks on October 31. In the process of answering a question, Greco testified that McVay had also said "that Marla had interrupted her interview." Yet, that bolt from the blue tended not to be confirmed by McVay's above-described written account of what had occurred when Morgan had come to the office, with Soole in tow. That assertion—interview-interruption—is one of the reasons for having suspended Soole on November 4. Given that fact, it seems inexplicable that, if McVay in fact had said that, Greco would have omitted it from his description during direct examination—"when, presumably, Respondent was presenting the facts in a posture most favorable to its defense," *McKenzie Engineering*, supra—of what McVay had said on October 31.

Greco made his next misstep when he testified that, during a telephone conversation with Pavone at approximately 5:15 p.m. on October 31, he had mentioned, "Marla is giving us trouble about an apron and gave Lisa trouble about getting an apron." According to Greco, Pavone responded, "Investigate it and send the copies to Kathy." Greco repeated that purported remark by Pavone during cross-examination. At that point, however, he added that he had told Pavone, "John, there is a little thing going on right now. Lisa was just here concerning Marla's refusal to acknowledge the receipt of an apron." But, as described above, McVay never wrote, in her documentation form of what had occurred, that she had been involved in Soole's refusal to sign the form prepared by Solheim. And McVay never claimed, so far as the evidence shows, that Soole had refused to acknowledge the purchase of a new apron.

More trouble for Greco's foregoing account emerges from a review of Pavone's testimony regarding how he had learned about the events of October 31. He made no mention whatsoever about Greco having said anything to him on October 31, nor afterward, about what had occurred. Rather, Pavone testified, "My involvement was I knew—HR [Human Resources] made me aware that the issue had surfaced," adding, "I don't recall if it was Kathy [Allan] or Barb [Holsinger]. Someone brought it to me and said 'this is the second suspension.'" Of course that someone could not have been Greco. There is no evidence that as of October 31 consideration was being given to again suspending Soole. Accordingly, there is no corroboration by Pavone for Greco's above-described claim that he had been instructed by Pavone to investigate what had occurred on October 31.

Obviously, an investigation was conducted. Statements were obtained from the four above-named officials. Yet, no statement was obtained from Ebaugh, who claimed to have been the one to whom Galle reported there were dealers not wearing aprons. Nor was a statement obtained from Galle who, were Ebaugh credible, had been the one who discovered that dealers were apronless. True, neither of them had been involved in Soole's refusal to sign the documentation form prepared by Solheim. However, a rereading of the above-quoted Record of Counseling's assertions shows that part of the misconduct attributed to Soole on October 31 was "refus[ing] to acknowledge that she reported to work w/out AN ApRON." Certainly, based upon Ebaugh's account, he and Galle had been the lone two officials who possessed knowledge that Soole and other dealers had reported without aprons. Of perhaps greater significance, there is no evidence that a statement had been requested of Morgan who, after all, had been the guest services representative with whom Soole had spoken originally and, further, had led Soole to McVay's office.

Very little evidence was adduced regarding the steps which led Respondent to the decision to suspend Soole for 3 days on November 4. Greco testified that after having collected and submitted the statements of Solheim, Christianson, McVay, and Nepple, he had not heard anything more until November 3 at about 5 p.m. At that time, he testified, Allan had "said that we were going to suspend Marla the next day for insubordination and interrupting departmental—another department's managers meeting." "No, I was not" asked for a recommendation, testified Greco.

Pavone was unclear concerning his role in that suspension decision. "Someone brought it to me and said 'this is a second suspension,'" he testified. Such a description seems to imply that, by the time that it got to him, someone else already had made a suspension decision. However, Pavone never testified who that someone else might have been. And no other official of Respondent claimed to have made that decision, leaving a gap in the evidence concerning the sequence of events leading to Soole's November 4 suspension. The best that can be inferred is that Allan had been that someone else. Of course, she did not appear as a witness and so, there is no explanation of her reason for selecting suspension as the level of discipline to be imposed, if she had been the official who actually had made that selection.

Under Respondent's progressive disciplinary policy, Soole seemingly should not have been suspended on November 4, without first having been verbally counseled and, then, given a written warning for prior relatively recent infractions. But, there had not been two prior disciplines of Soole for previous infractions. So, selection of suspension, as the discipline to be imposed on November 4, seems excessive in light of Respondent's disciplinary policy.

Of course, by then Respondent's newly issued employee manual allowed a greater level of discipline to be imposed for infractions considered to be "severe" under "state and local laws." Forgetting an apron and having to borrow one, however, has not been shown to be conduct which violates any State or local law. Further, even to the extent that Soole's refusal to sign the documentation form and resultant effort to purchase an apron might be characterized as impertinent, there is no showing that either action violated any State or local law. To the contrary, all of Soole's October 31 conduct, except for perhaps her remarks to Christianson—which he initiated at a location of his choice—had occurred outside of the area patronized by casino customers.

True, Soole did have a prior recent Record of Counseling, issued to her on September 24 and notifying her of her first 3-day

suspension. Yet, as concluded in subsection B, above, that had been an unlawfully issued Record of Counseling. A legitimate defense to the second 3-day suspension can hardly be based on an earlier disciplinary suspension that violated the Act.

Beyond that, unlawful issuance of the September 24 Record of Counseling, as well as the concerted protected activity, knowledge and animus factors reviewed in subsection B, above, provide evidence of unlawful motivation for the November 4 Record of Counseling and suspension. And, as with the earlier one, Respondent's defense of legitimacy for the November 4 suspension is undermined by the general unreliability of its witnesses and, with specific regard to the defenses to the November 4 suspension, by the inconsistencies arising from the "evolving versions," *Arnold v. Groose,* supra, advanced by especially Greco, but also Ebaugh, by the absence of testimony from other central officials involved in the events of October 31, and by the complete lack of support for the assertions made in the November 4 Record of Counseling.

As to the latter, there is no evidence that anyone had asked Soole on October 31 "to acknowledge no more than that she reported to work w/out AN ApRON," independent of the reason stated on Solheim's documentation form for needing an apron and, also, of that form's warning about repetition of such conduct in the future. Of course, Respondent's officials could not have seen after October 31 what was stated on that form; Solheim admittedly had discarded it on October 31. More significantly, there is no evidence that Soole had "interrupted" another department's interview. Aside from her call to McVay, which was not shown to have been placed with knowledge that McVay then was involved in an interview, and from waiting in the hallway while Morgan went into McVay's office to pick up the key, Soole had done nothing which could be characterized as interruption of McVay's interview. True, from the hallway, Soole had spoken with McVay. But, she did so only after McVay had initiated a conversation. In her written account, even McVay did not characterize Soole's responses as having constituted an interruption.

I do not credit the testimony advanced to support Respondent's defense of legitimacy for imposing the November 4 suspension on Soole. In light of that conclusion, and the earlier-discussed factors showing that the actual reason for imposing that discipline had been a continuation of Respondent's retaliation against Soole for having sought Workers Have Rights Too's assistance and, concomitantly, to deter her, and other employees who learned of her second suspension, from continuing to seek assistance from Sturgeon and his organization, to achieve improvement in employment conditions at Respondent. I conclude that a totality of the evidence establishes that Respondent violated Section 8(a)(1) of the Act by suspending Marla Soole from November 4 through 6.

D. The Discharge of Marla Soole on November 11

One aspect of Soole's activities on November 4 would become pertinent to events following her return from suspension. Respondent follows what has been characterized as "a double check system" for employees to record their presence at work. Using their individual badges, employees would "swipe in" on a timeclock when they arrived for work. At shift's end they would use their badges to "swipe out" on that same timeclock, when leaving work.

In the casino is maintained a sheet of paper, a log, on which are printed the names of casino employees. Upon reaching the casino each day, those employees write their time of arrival by their printed names and sign the log. The purposes for doing so are to inform casino-supervision who has reported for each shift, to serve as a double-check on the timeclock entries, and as the basis for dividing up the tokes—dealer tips, as discussed in subsection E, below—for shifts. Under the procedures contemplated by Respondent, those employees would sign out by their names on the log when they finished their shifts and left work.

The testimony shows that for some period prior to November 4 casino employees had been following the practice of signing in and, in addition, signing out on the logs when they arrived for work. Doing so had been simply a matter of convenience, in the employees' view, and of avoiding the possibility of forgetting to sign the log when leaving work. Should a casino department employee leave unexpectedly early, she/he would simply correct the log or, as Rosenbaum testified that she had told Greco and Galle after November 4, "would call the supervisor when I got home and let them know that I had forgotten to do that."

Interestingly, none of Respondent's table games shift managers or floor supervisors denied having ever been called by, at least, Rosenbaum to make such corrections. Nor did any of those officials, shift managers and floor supervisors, deny having been aware that casino employees were following that simultaneous sign-in/sign-out practice. In consequence, there is some basis for concluding that Respondent had been aware that at least some of its employees were following that practice.

Such a conclusion is reinforced by the above-stated fact that one reason for requiring employees to sign-in on the logs had been to inform casino supervision of who had and who had not reported for work as scheduled each day. To accomplish that objective, presumably the logs were reviewed daily at that level of supervision. Obviously, those examinations would occur at shifts' beginning and, equally obviously, would reveal to supervision that at least some employees had already signed out, even before their shifts had begun.

On November 4 Soole had followed that sign-in/sign-out practice when she had arrived for work. As set forth in the preceding subsection, she was suspended that day. As she left, she neglected to correct the sign-out time already recorded on the log for that day. As it turned out, Soole's neglect to do so led a payroll department employee, identified only as Ardeth, to adjust the timecard entry to show that Soole had swiped out at her scheduled November 4 departure time. Ardeth's action, in turn, led Respondent to fire Soole on November 11, for having falsified her timeclock record—a termination which the General Counsel alleges to have violated Section 8(a)(1) of the Act.

With regard to the sequence of events leading to that termination, Soole returned to work, from her second 3-day suspension, on Friday, November 7. She worked that day and during the following one, November 8. She took her scheduled days off on November 9 and 10. When she reported for work on Tuesday, November 11 she was summoned to an office where

Greco notified her of her termination. That termination is recorded on a Record of Counseling. In pertinent part, that Record of Counseling states that Soole "has Been previously counseled for Breach of company Security [sic]" and that "ARGOSy CORPORATE Policy states that each employee is responsible for the use of their time clock badge [sic]," with the result that, "Falsifying or altering any [Respondent] document including time cards is considered severe enough to warrant termination of employees." The Record of Counseling continues by stating that Soole "is being terminated as a result of Exhibit B Employee Handbook which states an employee must be barred from (6) six months to permanently. Marla is excluded from the property for a period of one year (11–11–97—11–11–98)." The complaint also alleges that the 1-year bar from the premises violated Section 8(a)(1) of the Act.

During the above-mentioned meeting with Greco, Soole denied heatedly that she had swiped out on the timeclock on November 4. She admitted that it had not occurred to her, given the circumstances of that meeting, to bring up the possibility that someone in the payroll department might have adjusted her timeclock record to correspond with her sign-out time on the log. In fact, there is no evidence that any employee, nor even supervisor, had regarded the logs as documentation to which payroll department employees looked when preparing their own records of employees' attendance. Greco rebuffed her denials and Soole was escorted from Respondent's facility.

Once again Respondent presented a defense marred by inconsistencies and contradictions, as well as by uncorroborated assertions. Pavone acknowledged having been the official who had made the ultimate discharge decision. He testified that his decision had been formulated after it "was brought to my [sic] by accounting and HR that there appeared to be a fraud regarding punching out" by Soole; "Subsequently I was made aware that Marla may have given her timecard to someone else to punch out for her." According to Pavone, "HR brought the file in. We reviewed the file. We looked at where Marla was in the disciplinary process and we determined at that point that she needed to be terminated because she was well past the normal steps that someone would go through for termination." All else aside, that simply had not been true. Soole had received two prior disciplinary records of counseling. Under Respondent's progressive disciplinary policy, she would have reached the suspension stage, not the termination stage.

Beyond that, Pavone never identified who from "accounting" and who from "HR" (Human Resources) had been involved in bringing the subject of Soole's timecard to his attention. Nor did he identify the person who purportedly had made him "aware that Marla may have given her timecard to someone else to punch out for her," a matter addressed in greater detail below. Also left unidentified was the other(s) "We" with whom he had "reviewed the file." In addition, no one testified that she or he had been involved in the process which Pavone claimed had led him to determine that Soole should be fired. As a result, none of Pavone's foregoing testimony was corroborated by anyone, leaving him as Respondent's sole witness regarding the decision, itself, to discharge Soole.

Furthermore, Pavone's testimony resulted in an inconsistency with the above-quoted "Exhibit B" statement in Record of Counseling issued to Soole on November 11. By that date Respondent's new employee handbook had become effective. "**EXHIBIT B**" of that handbook lists 11 offenses warranting, according to its prefatory statement, "immediate termination of employment." One of those specifically enumerated 11 offenses is, "Falsifying or altering any [Respondent] document, including but not limited to, timecards, employment applications or other documents." Now, had that truly been the offense of which Soole was suspected by Pavone, and by whomever else with whom he assertedly had spoken, it appears to have been unnecessary for him to have "reviewed the file" and "looked at where Marla was in the disciplinary process," to make a determination that Soole "was well past the normal steps that someone would go through for termination." Regardless of her past record, under the literal reading of Exhibit B's preface, it should have been decided that Soole should be "immediately terminated."

At one point Pavone asserted flatly, "I believed that this was a fraudulent incident. I believed that Marla when she left the building was mad and gave her timecard to somebody else and had somebody else punch her out. In my opinion that's fraud." Surely, such an assertion would have disposed him to immediately discharge Soole, without regard to her prior record, blemished or unblemished. Aside from that consideration, however, Pavone also testified, "If this was a first incident I probably would have brought Marla in and said 'What did you do here? What is this?'" Not only is that latter testimony at odds with Pavone's first above-quoted assertion, reproduced in this paragraph, but it effectively concedes that, but for the unlawful earlier records of counseling, Pavone would have afforded Soole the opportunity to explain to him what might have occurred on November 4—that he would have investigated further before reaching his discharge decision, by speaking with Soole.

Two other related facts are left unexplained by Pavone's above-described account. First, he conceded that, as of November, there had been not even a prior hint that Soole would engage in fraud. In that conceded context, there is some basis for questioning why Pavone would so quickly have jumped to the conclusion "that this was a fraudulent incident."

Second, other considerations aside, Soole appeared to be a seemingly intelligent individual who appreciated the consequences of her actions. And Pavone appeared to recognize as much about Soole. Thus, it is difficult to understand how he could have concluded that she would have been so oblivious to reality that, after being suspended on November 4, she could have believed that she could get paid for November 4 by sneaking back to swipe out on the timeclock or, alternatively, enlist a confederate who would use Soole's badge to swipe out for Soole. Surely, such an action would eventually have been detected by Respondent. Surely, Soole was bright enough to appreciate that eventual detection would occur and, equally, Pavone appeared to recognize that Soole was bright enough to have appreciated as much. In short, Pavone's discharge decision tends to be diminished further by an asserted belief in conduct by Soole so reckless that it is difficult to believe that Pavone would recognize that Soole would not have engaged in it.

Once more Greco's testimony did not aid Respondent's situation. He testified that he had not been involved in making the decision to fire Soole on November 11. But, he acknowledged that he had prepared the above-quoted Record of Counseling. Asked how he had known what to write on it, Greco first answered, "Discussion with Ms. Allan." Then, for some reason, he changed direction abruptly and denied that Allan had told him what to write on that Record of Counseling. Instead, he claimed, he had been told what to write by "Mr. Terhune. The finance director." "He told me the type of words to use," testified Greco, in the end. If so, that created in somewhat of a gap in Respondent's overall defense.

To be sure, as quoted above, Pavone testified that "accounting and HR" had brought Soole's time discrepancy to his attention. Presumably, by "accounting" Pavone had meant Respondent's finance department; at least there is no evidence indicating some other department. Yet, Pavone made no further mention of involvement by "accounting" in the sequence of events which had led to his decision to fire Soole. It had been with "HR" that he had "reviewed the file" and "determined at that point that she needed to be terminated." Left unexplained, therefore, was how the finance director could have become reinserted, or even inserted, into the events which culminated in Soole's termination. That was not explained by either Greco's or Pavone's testimony. And it was never explained by Terhune; he was never called as a witness, though there was neither evidence nor representation that he was unavailable to testify.

During direct examination Greco made another of his little side trips which, once more, really added nothing to Respondent's defense. He claimed first that, as a result of Soole being recorded as having worked a full day on November 4, "a few dealers" had complained that Soole had been allocated a portion of the total tokes for that day. For each shift, by that date, tokes were totaled and shared among the dealers who worked on that shift. Inasmuch as Soole had been regarded by payroll as having worked the entirety of November 4, she had been allotted a full share of the tokes received during her scheduled shift, thereby depriving the dealers who had worked that shift of additional toke income.

As direct examination progressed, however, Greco reduced his "few dealers" description to one dealer: James Herron, an asserted "member of the toke committee," testified Greco. He continued by agreeing that he had reported Herron's complaint to Terhune. By the end of his direct examination, it seemed that Greco was testifying that he had supplied additional information prior to the decision to fire Soole—information which could have influenced Pavone's decision to discharge Soole: that she had cheated her coworkers of each's full share of tokes for November 4. In addition, his asserted predischarge report to Terhune would possibly explain what Terhune supposedly would later have told Greco "the type of words to use" on the Record of Counseling issued to Soole. However, Greco's testimony about those events having occurred prior to Soole's discharge collapsed during cross-examination.

As cross-examination progressed, Greco admitted that it had not been until after Soole's termination that he had made his report to higher authority, presumably Terhune, about Herron's complaint. In consequence, whatever the truth about a complaint by Herron, it was not a factor in Pavone's decision to fire Soole. That rendered immaterial, to the issue of legitimacy of Pavone's decision, Greco's entire testimony about that complaint lodged by Herron. As to why he had even raised the subject, it seemed that Greco was attempting to heap on Soole additional adverse information, thereby buttressing Respondent's defenses that she had become an unsatisfactory employee whom, for that reason, Pavone had legitimately decided to terminate.

After leaving Respondent's facility on November 11, testified Soole, it dawned on her that someone in the payroll department might have seen the November 4 log, showing Soole as having left at her scheduled departure time, and assumed that Soole simply had neglected to swipe out at the timeclock, leading that person to correct her timeclock-recorded departure time to show a scheduled time. Soole testified that she telephoned Ardeth and explained the situation. After checking her records, Ardeth reported back to Soole that, based upon the log, she had recorded Soole as having swiped out at shift's end on November 4. Soole wasted no time in calling and reporting to Respondent what had occurred. Ardeth also reported what she had done. Those events led Respondent to take two steps.

First, Greco and, for no reason explained by the evidence, Director of Surveillance Galle summoned Rosenbaum to a meeting at which, both Rosenbaum and Greco testified, she first was asked about one employee using another employee's badge to swipe out that other employee at shift's end. "That was a possibility," testified Greco, that Rosenbaum had used Soole's timecard to swipe out Soole on November 4. That "possibility" was consistent with Pavone's above-quoted testimony about being believing that Soole had given "her timecard to somebody else—[to] punch [Soole] out" on November 4.

Greco testified that he was "not sure" if the interview with Rosenbaum had occurred before or after Soole's discharge. Yet, it almost had to have occurred afterward. For, Greco never disputed Rosenbaum's testimony that she had told Greco and Galle, during that interview, about the sign-in/sign-out practice. So far as the evidence shows, Greco, at least, had not been aware of that practice prior to Soole's termination, there being no evident reason for him to review the logs. And Respondent contends that it had been Ardeth's report which led to revelation to higher management of the simultaneous sign-in/sign-out practice and, in turn, to the decision to reinstate Soole. Obviously, that sequence does not follow had Greco and Galle talked to Rosenbaum about the simultaneous sign-in/sign-out practice before Soole's discharge.

It is undisputed that Rosenbaum told Greco and Galle that she and other casino employees had been engaging in the sign-in/sign-out procedure and, moreover, that supervisors had made corrections on her sign-out times whenever she had neglected to do so, at times when she unexpectedly had left work before the end of her shift. Yet, though made aware of that practice, Respondent never investigated it any further, by inquiring if other casino employees also had been following it. More importantly, though Rosenbaum had conceded that she had been following that practice, no disciplinary action was taken against her as a result of her concession. As will be discussed below, a contrary course was pursued with regard to Soole having done so.

The second step taken by Respondent, in the wake of Ardeth's report and of Soole's call revealing her knowledge of what Ardeth had done, was to reinstate Soole. Pavone testified that, based upon Soole's call to Ardeth and the latter's report about what she had done in connection with Soole's November 4 departure time, "I brought our HR director in and said 'Reinstate Marla with her benefits and her vacation and we own her an apology,'" after which it was reported back to him that those actions had been taken. Even here, however, there was conflict between Pavone and Greco. Pavone gave no testimony about having said anything to Greco about reinstating Soole. In contrast, Greco claimed, "Mr. Pavone said to make it right. If there was something wrong, make it right. *Those were his orders to me."* (Emphasis added.) Greco never testified that Pavone's order had been relayed to him (Greco) through an intermediary, such as Allan.

That was not the lone problem with Greco's testimony about the reinstatement of Soole. When meeting with Greco and Allan on November 12, Soole was given a new Record of Counseling. This one recorded her reinstatement: "termination on 11–11–97 will be rescinded." However, it continues on by stating, "All documents concerning Record of Counseling 11–11–97 will be held without prejudice." It also states, "Marla's only infraction was the pre-mature [sic] signing out of hourly and toke payroll." As a result, while Soole was being reinstated, the record of her termination would remain and her personnel record would show another "infraction"—one for which only her personnel file would contain any record, even though Respondent had full knowledge that she had been but one of the employees who had been following the sign-in/sign-out practice before November 4. Thus, under Respondent's progressive disciplinary policy, that left Soole to fear that she was vulnerable to a repeated act of severe future discipline, despite her reinstatement, based upon one more adverse record in her personnel file.

Another point arises from the "infraction" statement in Soole's November 12 Record of Counseling. Greco admitted having written what was on that document. He claimed that he had done so "[w]ith Marla's help," explaining, "Marla was telling me as I was going along and she said 'I'll gladly sign this paper.[']" Now, it is rather unbelievable that an employee would tell her employer to list an "infraction" on a Record of Counseling which would be issued to her. To the contrary, neither Greco nor, obviously, Allan contested Soole's testimony that, during the November 12 meeting, she had protested being "written up for something that [other] persons . . . and other dealers had been signing in and out all the time anyways." Given that undisputed testimony, it is simply not believable that Soole would have expressed willingness to "gladly sign" such a Record of Counseling. Having observed her as she testified, I have no doubt that Soole had protested that wording on her November 12 Record of Counseling. She was not reluctant to protest even the slightest criticism of her. So, it seems unlikely that she expressed glad willingness to sign such a Record of Counseling, much less helped Greco to write it.

It also is plausible that she had protested retention of the November 11 Record of Counsel, even if she was being told that it would be "without prejudice" to her. After all, given its earlier unlawful conduct, Respondent's words and actions had a not particularly reliable track record by November 12. Pavone, the decisionmaker for Soole's reinstatement, never explained why Respondent would retain a record of vacated discipline. Obviously, Allan did not advance an explanation. Nor, while he testified that Soole had been told that the November 11 Record of Counseling would "be held without any part of the progressive discipline or anything," did Greco actually explain why retention had been viewed as necessary by Respondent. The only explanation suggested by the record, given Respondent's ongoing unfair labor practices, is that retention was viewed by its officials as one more means of impressing upon Soole the authority which Respondent could exercise over her employment future.

Equally puzzling is the allegedly unlawful one-year bar of Soole from Respondent's premises. Pavone testified that he had been the official who had made that decision. As to his reason for having selected a ban of 1-year's length, he testified that it had been a combination of Soole's prior discipline and of her purported fraudulent act on November 4: "being that she had been through all these different progressive disciplines and I believed this was a fraudulent event that's what led me to the one year ban." In fact, termination for one of the offenses listed on the above-mentioned Exhibit B of the employee handbook does provide for the terminated employee being "barred from the property at least six (6) months and up to permanent barring from the property."

Of course, the longer Soole was barred from Respondent's premises—which, as will be seen in the succeeding section, meant not merely the boat, but also Respondent's parking lot and other nonbusiness-related areas—the more difficult it would be for her to communicate with her former coworkers about perceived unsatisfactory employment conditions and assistance in obtaining correction of them. Pavone never actually explained why had had chosen a 1-year bar, as opposed to, say, the 6-month minimum stated in the employee handbook. To the extent that selection of 1 year might have been based upon Soole's September 24 and November 4 suspensions, it resulted from unlawful disciplinary actions and, accordingly, cannot be said to have been legitimate.

Beyond Pavone's above-quoted testimony about his reasons for having selected 1 year as the duration for the ban, both parties papered the record with Records of Counseling showing discipline of other employees. With respect to the bar aspect of Soole's November 11 discharge—and, for that matter, the discharge of December 10, discussed in the succeeding subsection—most of those records are meaningless to analysis. For, someone other than Pavone had chosen the bar periods imposed prior to July.

Brown had become director of security during that month. Before then Pavone had not been the official who chose the length of bars to impose. That had been former Director of Security Jim Reno. Only after Reno left did Pavone begin making bar decisions. Pavone testified that he had done so, "Because of [Brown]'s position stepping up from the assistants [sic] I then took control again [sic]." In other words, to give Brown the opportunity to acclimate to his new position.

With respect to post-July bars, it is significant that Marilyn Raymond would be terminated on February 4, 1998, "As A Result of Exhibit B, Employee Handbook," according to the Record of Counseling pertaining to that termination. Yet, she was barred for only 6 months from Respondent's premises. Pavone, the by-then maker of bar decisions, never explained the disparity between Soole's bar and that of Raymond, though both had been terminated ostensibly for Exhibit B infractions. Nor was an explanation provided by any other witness for Respondent.

There can be no question that, over the years, Respondent has barred employees for prolonged periods, some for life. The only witness who testified about the purpose for bars was Brown. He explained that their purpose "would either be for, as you said, to protect an employee who is already there, or as a cooling off period. We don't want the employee to come back the next day and disrupt the casino." So far as the record shows, however, there was no need to protect any employee from Soole and, moreover, there is no evidence providing a basis for inferring that Respondent had viewed her on November 11 as a potentially disruptive individual. Certainly, Pavone never advance either explanation. In sum, the record is left with no explanation for selection of a 1-year bar.

The fact that his discharge decision had been made, at least in part, on the basis of prior unlawful discipline of Soole, shows that Pavone's November termination decision had not been based upon legitimate considerations. Had he not relied upon the earlier unlawful suspensions, he admittedly would have called in Soole and listened to her explanation for how she had come to be swiped out at shift's end on November 4. In such a less confrontational setting, than the one posed on November 11 when Greco called her in and abruptly told her that she was fired, it might have earlier occurred to Soole what might have happened. True, that is not a certainty. But, it admittedly had been those earlier unfair labor practices which had led Pavone to eschew a meeting with Soole. As the statutory wrongdoer, Respondent must accept responsibility for the adverse consequences of its own unfair labor practices—is not entitled to the presumption that, had such a meeting between Pavone and Soole been conducted, it no more would have occurred to Soole to mention possible correction in the payroll department, than had been the fact during her discharge meeting with Greco.

There is obvious superficial logic to the defense advanced by Respondent: that its officials simply had made a mistake based upon payroll records for November 4. Still, the official who made the decision—Pavone—did not advance reliable testimony and was not credible. So, mistake is not a defense supported by credible testimony, especially given the above-mentioned inference that at least some of Respondent's lower level supervisors had to have known that employees were signing out when they signed in and the absence of testimony by any other official whom Pavone named when describing the sequence of events assertedly leading to his discharge decision.

As discussed in preceding sections and subsections, Soole was known to have been active in connection with securing assistance of Workers Have Rights Too, to obtain correction or mitigation of perceived unsatisfactory employment conditions; Respondent was hostile to communications among its employees about employment conditions with which at least some of them were dissatisfied and, further, was antagonistic toward Sturgeon and his organization; Respondent was not reluctant to act upon that hostility by committing unfair labor practices; and, disciplinary actions reflected in records of counseling were one means by which it engaged in those unfair labor practices.

By November 11 Soole already had twice been the target of unlawful discipline. As a result of her unlawful suspensions of September 24 and November 4, Respondent had been able to construct an adverse employment record against her, even though her record had not only been spotless for 20 months prior to September, but her performance had been applauded by Respondent during that 20-month period. Viewed from Respondent's perspective, those two disciplinary suspensions served to nullify her earlier exemplary record and, in addition, provided a basis for contending that, on November 11, it had done no more than discharge an employee whose performance had recently soured, as shown by the September 24 and November 4 suspensions. That is, it seized upon the corrected payroll record to support discharging Soole, never anticipating that she might contact some in payroll, like Ardeth, who would admit to Soole having made that "correction."

Indeed, even after Ardeth's report Respondent made an effort to find an alternative legitimate reason for discharging Soole: by calling in Rosenbaum and trying to find out from her whether she had swiped out Soole on November 4—an unrealistic alternative, given Ardeth's report that she, not some other employee, had "corrected" Soole's November 4 timeclock record.

In view of the totality of the factors reviewed above, I conclude that Respondent has failed to provide credible evidence of a legitimate reason for having fired Soole on November 4. Given that conclusion and the totality of the evidence showing that Respondent's actual reason had been its hostility toward Soole for engaging in activity protected by the Act, I further conclude that her November 4 termination violated Section 8(a)(1) of the Act.

Of course, Soole would not have been barred from Respondent's premises for any period had she not been unlawfully discharged. Since that discharge was unlawful, a bar of any duration would likewise be unlawful—the latter being a direct consequence of the former. Beyond that, Pavone never explained his choice of one year for the bar's duration. As discussed above, so prolonged a bar is not consistent with the reasons for imposing bars upon discharged employees and, further, is inconsistent with the duration of the bar later imposed upon Raymond even though, she like Soole, was discharged under Exhibit B of the employee handbook. On the other hand, barring Soole for so long a period would impede her access to Respondent's employees, at the most logical location for speaking with them, thereby impeding Soole's activities protected by the Act. Therefore, I conclude that by barring Soole from Respondent's premises for a year on November 11, Respondent further violated Section 8(a)(1) of the Act.

E. December 10 Discharge of Marla Soole and Suspension of Marilyn Raymond

As discussed in subsection C, above, Sturgeon had not been particularly active on behalf of Respondent's employees for

most of October, after the "SURVEY FORM" had been published in Sioux City's newspaper. That changed on November 17 when Sturgeon filed the unfair labor practice charge which has led to this proceeding. To the extent pertinent, that charge stated that, since September 8, Respondent discriminated against Soole, Case, and Gantz, by disciplining them in retaliation for their concerted protected activities. In addition, Sturgeon took on representation of Soole in her attempt to obtain unemployment compensation for her November 4 through 6 suspension. Furthermore, he appeared before the Iowa Racing and Gaming Commission on November 20 and protested assertedly unjust discharges by Respondent, as well as conduct which had assertedly led some of its employees to quit.

One way or another Respondent obviously learned of Sturgeon's above-described activities. In addition to those activities, Sturgeon communicated directly with Pavone. By letter to the latter dated November 3, Sturgeon gave notice of his intention to appear before the state commission on November 20 and, also, revealed that, "We have conducted a survey of many of your former employees . . . and have discovered terrible injustices, which will be shared with the commission."

To probably the great surprise of no one, Pavone did not greet with pleasure the statements in Sturgeon's November 3 letter. In fact, Pavone responded by letter dated November 6, denying any improprieties taken against employees by Respondent, accusing Sturgeon of attempting to damage Respondent's "operation, good name, and reputation," asserting that Sturgeon was not an attorney and could not be "authorized to legally represent any individual," as well as asserting "it is not clear whether" Workers Have Rights Too "is duly authorized to conduce [sic] its operations under Iowa law," and warning that, as Sturgeon's "conduct is not only unwarranted and clearly intended to harm" it, Respondent "will pursue every legal avenue to prevent illegal and unwarranted acts against it and to protect the integrity of its operations and its good name and reputation." Obviously, those statements do not violate the Act, being mere statements of opinion and, further, having been addressed to someone other than a statutory employee. Even so, they do show that, as of November 6, Respondent, specifically Pavone, had a state of mind not favorably disposed toward Sturgeon and his organization.

Prior to his November 20 appearance before the Iowa Racing and Gaming Commission, Sturgeon, aided by a few of Respondent's employees, including Soole, mass-mailed a questionnaire to Respondent's former and present employees. That questionnaire sought information about discharges, as well as about warnings and suspensions, and their causes, about past union membership, and about willingness "to be part of the efforts of [Respondent's] employees to prevent further unjust discharges and to correct the conditions which have caused so many to quit" working for Respondent. The questionnaires were accompanied by a covering letter in which recipients were informed of concern that "too many of our fellow workers" have been "discharged or forced to quit for outrageous reasons," and that, "We hope to be able to help those still employed there and those who will come aboard later[.]"

There is no direct evidence that any of Respondent's statutory supervisors or agents actually had seen the questionnaire and covering letter. Still, as Greco acknowledged, "rumors, rumors, rumors, rumors" circulated freely among Respondent's personnel complement. So, there is some basis for inferring that Respondent likely would have become aware of the questionnaires and covering letters. After all, there is no evidence that Respondent's employees ordinarily received communications of that nature. So far as the evidence discloses, their receipt by employees was an unusual occurrence and, accordingly, the type of occurrence which naturally would lead to communications among employees about having received them.

More directly, when Sturgeon appeared before the state commission on November 20, in attendance had been Pavone and Holsinger. Neither denied having heard Sturgeon say to the commission, during his prepared remarks, that communications had been "mailed to those who were licensed to work on the Belle during the last 12 months," and that he had "already received several responses." Consequently, even if Respondent had not known specifically about the content of the questionnaires and covering letters, by November 20 Pavone and Holsinger had been put on notice of their existence and transmission to Respondent's former and present employees, as well as that some of those employees had responded to them. Beyond that, with particular regard to Soole, the charge and his representation of Soole in unemployment compensation proceedings had to supply Respondent with knowledge of Soole's ongoing association with, and support for, Workers Have Rights Too.

Against that immediate November background, on December 10 Soole was again fired and, once more, barred from Respondent's premises for 1 year. Because the charge had been filed by then, specifically naming Soole as an alleged discriminatee, it is alleged that her discharge and accompanying 1-year bar had violated Section 8(a)(4), as well as Section 8(a)(1), of the Act. Furthermore, also disciplined for the same incident as Soole was Marilyn Raymond. The latter was suspended for 3 days without pay. Proceeding from the theory that discipline of Raymond had been intended to cloak unlawful motivation for Soole's discharge and bar—to make the latter discipline appear to have been legitimately motivated—the General Counsel alleges that Raymond's suspension, as well, had violated Sections 8(a)(1) and (4) of the Act.

The discipline meted out on December 10 was based upon an incident which had occurred on December 5. That incident involved toke bets at the craps table. As already mentioned in subsection D, above, a toke is a tip for dealers—that is, a bet placed by players for dealers. If it loses, the toke is placed, along with other losing bets, in the house's box. If it wins, the bet, itself, appears to also go into that box, but the winnings are deposited in the toke box. At the end of the shift, under the procedure in effect by November, all winnings from toke bets made during the shift are pooled, then divided among the dealers who worked that shift.

Craps differs from other games. With blackjack, for example, winning and losing is determined at the end of a hand. Similarly, roulette winners and losers are determined once the ball stops rolling and the wheel stops turning. In contrast, while there can be losers after the first roll of the dice in craps, more frequently additional rolls of the dice occur during a sin-

gle game. Moreover, depending on how particular bets are placed, there can be individual wins at certain points during one game, before an overall loss is declared due to a particular roll, say a seven. As a craps game progresses, accordingly, a toke can win, but the game can go on. It was that type of situation which was presented on December 5.

It is undisputed that Respondent's rule is that when a toke wins, both the winnings and the toke must come down—be deposited in the appropriate box, to prevent parlaying. As will be seen, a crucial issue underlying the December 10 discipline is whether Respondent had allowed an exception to that rule for a player named James Sasse.

During September, Sasse had benefited monetarily from settlement of a cause of action which he had brought. From October through at least December 5, he testified he had come to Respondent "five or six times maybe," where he played craps. Apparently on the first, but perhaps the second, visit he won approximately $10,000, a relatively large amount from Respondent's perspective. Moreover, he apparently had been a successful player during some, if not most, of his other early visits. On occasions when he "was doing pretty good" during such a visit, Sasse testified, he would put down tokes on place numbers: "Well, if I got a point at 7 and we throw a lot of numbers I count on making numbers, not points. I'm counting on the numbers and when that point is finally over and I've done pretty good then I will put the bet up for [dealers] on the next roll," after already having won some throws.

On December 5 Marilyn Raymond was sitting box for craps. A box person is not one of the four-dealer craps teams, described in section I, above. That is so, probably, to separate that person from the four-member craps teams. For, box persons are responsible for making decisions concerning abnormalities or dispute arising as craps games are played.

On December 5, Soole was one of the base dealers at the table at which Raymond was sitting box. At the time of the December 5 events which led to termination of the former and suspension of the latter on December 10, Sasse had come to the end of the craps table for which Soole was base dealer.

There is no contention that Sasse and Soole were in some kind of cahoots that day. Like Respondent's officials, as discussed below, Soole knew that Sasse was a relatively high-roller. He was able to identify her during the hearing as one of the dealers whom he had seen during his visits to Respondent. There is no evidence that, other than from appearance, Sasse had any other familiarity with Soole. In fact, he did not even know her name.

Apparently, December 5 turned out to be a good day for Sasse. Eventually, he made toke place bets, on six numbers, for the dealers. As that game progressed, one of those numbers hit. Soole handed the winnings to Raymond, for deposit in the toke box, but left the toke, itself, on that number. Consistent with Respondent's rule, Raymond said that the toke also should come down. Soole replied that Ebaugh had said that winning tokes made by Sasse could be left up until the overall game was completed. Raymond accepted Soole's representation—"Being [Ebaugh] was supervisor over me," Raymond testified—without trying to verify what Soole had said.

In the surveillance room, Galle testified that he had observed, by camera, winning craps tokes not being taken down and, as a result, went to the casino floor "to contact Sherry Rich," that shift's table games shift manager. Both Galle and Rich testified that he had told her that dealers on the craps table were not taking down winning tokes.

Rich testified that she went over to the table and told Raymond that the dealers were not taking down tokes that were hitting, but that Raymond answered that she had been told that dealers had permission to leave them up. According to Rich, Soole chimed in, "We have permission." Rich further testified that when she asked who had given that permission, the dealers had looked at each other, without answering, and eventually Soole pointed at Sasse, saying "He told us we could." A seemingly surprised Sasse, testified Rich, then said that he had "told them that they could leave them up," to which Rich responded, "You don't run the game." Neither Raymond nor Soole made any mention whatsoever of this exchange involving Rich.

Yet, occurrence of that exchange tended to be confirmed by Galle. He testified that, after speaking with Rich, he had remained standing at the "cage side of the craps table" as he watched Rich approach and speak to Raymond. Although he could not hear what Rich and Raymond were saying, testified Galle, he was able to hear Sasse "say something about the toke bets hav[ing] to stay up," because Sasse had spoken "a little louder" than Rich and Raymond had been speaking. But, Galle did not testify that it had been Rich who had replied to Sasse. Rather, Galle testified that he had told Sasse, "No, sir, the toke bets are going to fall."

While not denying with particularity Rich's above-described account of what had occurred on December 5, Raymond agreed that on that day Galle had been "standing at the end of the craps table watching." Implicitly Raymond did concede that something must have happened before she was relieved as box person. For, she testified, "After I was relieved from the box he went down to the other end of the pit and I stopped and tried to explain to him *what had happened*." (Emphasis added.) Now, if nothing "had happened" earlier at the craps table, there would have been nothing that Raymond would have felt that she had to "explain."

Clearly, moreover, what "happened" had pertained to something said about not having taken down winning toke bets. "I told him that I told the dealers that they were supposed to come down and that they said that Brad told them they could leave them up," testified Raymond, but Galle responded, "Well, they are supposed to be." Raymond made no mention of anything having been said by Soole at that stage of December 5's events.

Soole, however, inserted herself into the description of that conversation between Raymond and Galle. According to Soole, before the entire incident had occurred on December 5, Galle had been standing at "the right end of the table, the far end from where I was dealing, and he watched the game for approximately five to ten minute[s]," and, moreover, Soole conceded that Galle had seen her leaving up the winning toke bets. Yet, Soole made no mention of Rich having spoken with Raymond, of having spoken to Rich, of Rich speaking to her (Soole) and the other dealers, and of Sasse becoming involved in that exchange between Rich and Raymond.

Instead, Soole described Galle as having observed the game while it progressed. According to Soole, "Marilyn was relieved from her position" as box person and "went over and was chatting with Mr. Galle," whom Soole overheard say loudly, "These dealer bets don't stay up." According to Soole, "I looked over at him and I stated to him" that, "Brad Ebaugh had told us that those bets stay up," to which Galle retorted, "Those bets do not stay up." Of course, if Galle had not said anything until after having observed the game and until Raymond had been relieved as box person, then that might be some indication that he had not initially viewed leaving up the winning toke bets as so serious an infraction as now portrayed by Respondent. Indeed, that seemed to be what Soole was tailoring her account—that Galle had merely watched the game and had only said something about the tokes when Raymond had engaged him in conversation—to try to accomplish.

On December 10 Soole was once more summoned to a meeting with Greco. At that meeting, Soole received another Record of Counseling, showing that she was being terminated "under Exhibit B" of the employee handbook for "violat[ing] dept. policy [and] Argosy Internal Controls on six (6) different occasions"—the "six" referring to the number of winning $2 tokes which Soole had left on the table on December 5. The Record of Counseling also recites that Soole was barred from Respondent's premises for, "A period of (1) one yeaR [sic]."

Raymond also was summoned to a meeting with Greco later on December 10. During it, she received a Record of Counseling suspending her for 3 days because, as box person on December 5, she had not insisted that Sasse's winning toke place bets be taken down.

It is incontrovertible, given the testimony of all witnesses questioned about the subject, that Respondent's rule is that winning toke bets must come down. It also is incontrovertible that Soole had been responsible for Sasse's winning toke bets having been left up on December 5. Her efforts afterward to blame it all on Raymond, as box person, were inexplicable, given that Soole admitted that Raymond had done so in reliance on what had been said by Soole. These fact would appear to provide legitimate basis for having disciplined Soole and Raymond on December 10. Yet, any possibility of according any legitimacy to Respondent's defense has been obliterated when certain other evidence is added to the overall situation.

Once more, Respondent's witnesses advanced inconsistent testimony. First, both Pavone and Holsinger testified that they had jointly made the decision to fire Soole.[7] Holsinger also acknowledged that she and Pavone had "discussed . . . and I believe legal was involved" the suspension of Raymond. The crucial point of Holsinger's testimony is not that counsel had been consulted, but her concession that she did possess first-hand knowledge of the reasons for the discharge of Soole and of the suspension of Raymond on December 10.

As to the comparative differences between the discipline imposed on those two employees, Holsinger testified, "Ms. Raymond was at a different step of progressive discipline," because Raymond did not have any prior suspensions on her record. "Correct," she later testified, Raymond had not been terminated, as was Soole, because of that fact. Two conclusions can be based upon that testimony. First, regardless of the characterization of the offense as an "Exhibit B" one, Respondent did not regard it as one which would inherently warrant discharge; else Holsinger would have testified that automatic discharge of Soole would have been discussed with Pavone and counsel. And, of course, Raymond likely also would have been fired.

Second, as concluded in subsections B and C, above, Soole's two 3-day suspensions, on September 24 and on November 4, had been unfair labor practices. Thus, consistent with what was said in the immediately preceding subsection, Soole's December 10 discharge cannot be regarded as legitimate because, Holsinger admitted and selection of suspension for Raymond shows, that Soole would not have been fired on December 10 had she not earlier been twice unlawfully suspended.

Beyond that, secondly, Respondent ended up painting itself into somewhat of a corner by the end of its case-in-chief. As set forth above, Soole acknowledged having said on December 5 that Ebaugh had authorized leaving up Sasse's winning toke bets. But, she also testified that December 5 had been the only occasion when she had done that. Still, she testified that she had previously observed other dealers doing so and, in addition, box persons allowing those dealers to leave up Sasse's winning toke bets. In fact, both dealers Rosenbaum and Marshall corroborated that testimony—both testified to having followed a practice of leaving up Sasse's winning toke bets. Furthermore, Rosenbaum and Marshall both attributed authorization to do so to Ebaugh, as had Soole.

Ebaugh denied having ever authorized anybody to leave up winning toke bets. Soole conceded that she had never actually heard him authorize leaving them up. Rosenbaum testified that "probably like a month and a half" before December 5, she had been present when Sasse had told box person Sally Venteicher that he wanted a winning toke place bet to remain up. According to Rosenbaum, Venteicher left the game and "went to talk to Brad on the podium," after which Venteicher "came back to the table and told me to go ahead." "No, I did not," admitted Rosenbaum, hear the words exchanged between Venteicher and Ebaugh that day.

Marshall claimed that she had actually overheard Ebaugh authorize leaving up Sasse's winning toke bets. But, her claim is highly suspect. According to Marshall, during "either late September or early October," Ebaugh had been the pit boss and had

[7] They did so in conjunction with counsel. Whatever adverse weight appeared to be placed, during the hearing, upon involvement of counsel in that decision, and the one pertaining to Raymond, the fact is that by December Respondent had been confronting action by Workers Have Rights Too, with whom Respondent knew that Soole had aligned herself. More importantly, an unfair labor practice charge had by then been filed on, inter alia, Soole's behalf. To regard adversely to Respondent its decision to seek advice of counsel in those circumstances would be "to promote the ostrich over the farther-seeing species," *Partington v. Broyhill Furniture Industries,* 999 F.2d 269, 271 (7th Cir. 1993), a citation I promised during the hearing to provide. On the other hand, the fact that counsel had been consulted does not somehow serve, standing alone, to necessarily legitimize a respondent's defense. "It is a rare attorney who will be fortunate enough to learn the entire truth from his own client." *Wheat v. U.S.*, 486 U.S. 153, 163 (1988). See also *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1209 (1994).

been "in the pit behind the craps table" when Sasse first said to leave up his winning toke place bets. She testified that, "Desiree [Rosenbaum] had asked if the dealer bets were supposed to stay up, because the player wanted them, and Brad responded that yes, they were." "But I do recall that I heard the question and the answer," asserted Marshall.

If so, Marshall heard something quite different than Rosenbaum. Given Rosenbaum's above-described testimony, there is no way that Marshall's description—that Rosenbaum had asked Ebaugh and that Ebaugh had responded to her—can be relied upon to attribute authorization to Ebaugh that Sasse's winning toke bets would be left up. Moreover, there was neither evidence nor representation that Venteicher was not available to testify, in corroboration of Rosenbaum's description. But, Venteicher was never called as a witness, with the result that Rosenbaum's description is uncorroborated.

Of course, discussion in the immediately foregoing paragraphs seems to fortify further Respondent's contention that there had been no authorization to allow Sasse's winning toke bets to remain up and, further, that a practice of doing so had not existed prior to December 5. However, the General Counsel's witnesses testified that such a practice had existed. Soole testified that she had seen dealers Marshall and Rosenbaum do it and, moreover, that she had seen it done when Venteicher, Richard Finnegan and Mike Christianson had been sitting box, as well as, "I'm positive that Brad [Ebaugh] was sitting box on occasion also." Marshall also testified that there had been instances when Sasse's winning toke bets had been left up: "I would say probably between four and eight times." Like Soole, Marshall testified that sitting box on those occasions had been Finnegan, Venteicher and Ebaugh. She named Rosenbaum as another dealer, besides herself, who had left up Sasse's winning toke bets. Rosenbaum agreed that she had done so prior to December 5, as had Finnegan, Holly Nguyen, and Connie Stolpe. Sitting box on those occasions, testified Rosenbaum, had been Venteicher, Finnegan,[8] and Ebaugh.

Respondent countered that testimony about practice with evidence in two areas. First, Ebaugh denied having ever seen anyone leaving up winning toke bets. Had he seen it, asserted Ebaugh, "I would tell the box person" those bets had to come down.

The second area involves Respondent's surveillance operations. As pointed out in subsection B, above, every game is surveilled by at least one camera. As described above, Director of Surveillance Galle testified that one of those cameras had revealed on December 5 that Soole was not taking down winning toke bets at the craps table. He denied having been aware of any similar disclosure by cameras on prior occasions. Indeed, from Galle's description it seems almost impossible for such a practice, of leaving up Sasse's winning toke bets, to have occurred without at least one instance of that practice having been observed by camera on at least one occasion. That conclusion seems only reinforced by evidence of intense scrutiny to which Sasse's play had been subjected.

Surveillance of Sasse had not been merely left to what might be noticed from review of what cameras were showing. As Galle put it, Sasse "had beat us for over $10,000 in his first encounter at" Respondent. In fact, Rich testified that, during his fall visits, Sasse "wins big, he loses big." All of Respondent's witnesses asked about the subject testified that such a player would be one watched closely as he played. "Sure, surveillance would watch him very closely," Ebaugh testified. Most significantly, Galle testified, "I've observed him on other occasions. Any time he came in after that initial beating is—I got called to the room," because after Sasse's initial big win, "I informed my staff that any time this guy comes in to give me a call because I want to watch his activities."

The foregoing evidence of both camera and, in effect, intense human scrutiny of Sasse's play leaves scant room for reaching a conclusion that dealers had been following a practice of leaving up his winning toke bets. Given that special scrutiny, surely Respondent's surveillance personnel—particularly, Galle—would have noticed that practice occurring well before December 5. In view of that surveillance evidence, Ebaugh's denial, and the above-described inconsistencies which leave the record devoid of any reliable firsthand account of Ebaugh saying that Sasse's winning toke bets could be left up, by the conclusion of Respondent's case-in-chief its position about such a practice seemed secure: dealers had not been authorized to leave up Sasse's winning bets and a practice of doing so could not have been occurring prior to December 5. However, the camera and special human scrutiny of Sasse were turned on their head—against Respondent—during rebuttal, when Sasse was called as a witness.

He had been contacted by counsel for the General Counsel relatively late in the process. It was obvious as he testified that, while an honest individual, he did not recall all of the details of events, particularly about all details of what had occurred on December 5—most probably because, as of that date, it had been an incident which he had not regarded as one that he would eight months later be obliged to describe, as a witness.

Even so, Sasse did recall having come to play craps at Respondent, "I would imagine five or six times maybe," between September and December 5. He also remembered, consistent with Rich's testimony, that during those months, "I was doing pretty good." And he remembered that, "[p]robably three or four" of those times he had made toke place bets, when he had a "hot roll," once the rolls were over. Most importantly, he remembered, as the dealers had testified, that he had "asked them to leave the bets up" at the beginning, "*and they did it*." (Emphasis added.) Thereafter, different dealers would leave up his winning toke bets—as Sasse testified during cross-examination, "Three or four times. When I first started coming in I was—I was winning pretty good there for a while."

As pointed out above, Sasse appeared to be testifying truthfully. Indeed, he was a neutral, if belatedly notified, witness who had no seeming interest in Soole nor in the outcome of the allegations made against Respondent by the General Counsel. In fact, he appeared to lack any appreciation of what was involved in this case, at the time that he testified. His account that he had said to leave the winning toke place bets up, and that dealers had been doing so thereafter, corroborates the accounts by the dealers. More significantly, he had done so with sufficient frequency that it seems most improbable, given the

[8] Like Raymond, apparently Finnegan was a dual-function employee.

special scrutiny to which his play was being subjected, that surveillance personnel had not seen those winning toke bets being left up prior to December 5. Based on Sasse's credible testimony, the evidence of ongoing intensive surveillance of his craps playing, and the unreliability of Ebaugh's testimony, as illustrated in subsection C, and of the general unreliability of testimony given by Respondent's witnesses, I conclude that a preponderance of the credible evidence does establish that, even if Ebaugh had not actually been the supervisor who had authorized it, Respondent did know that dealers had been leaving up Sasse's winning toke place bets—a practice to which a stop was put only when Soole followed it on December 5.

As mentioned above, Soole was notified of her discharge at a meeting with Greco on December 10. Also present during that meeting were Galle, Holsinger, and Sprague. Soole testified that Greco had started by asking "why I was leaving dealer bets up," and that she had replied, "Because we were instructed to through our supervisors through Brad Ebaugh." It is worth pointing out, given the circumstances in which she made that reply, it is unlikely that Soole would have identified Ebaugh to the casino manager and other officials, had she not truly believed, and had some basis for believing, that Ebaugh had actually authorized leaving up Sasse's winning toke bets.

Soole further testified that, as the meeting progressed, she had explained, "I am not the only one that has done this," and named dealers—Marshall, Rosenbaum, Finnegan—who had done so in the past, as well as persons—Venteicher, Finnegan, Christianson, Ebaugh—who had been sitting box when that had occurred. According to Soole, Galle interjected, "Marla, you are the only one that we have seen on tape do this," to which Soole asked them to go back through the tapes showing Sasse playing, "because he was placing the place bets for the dealers every dealer that dealt to this gentleman was leaving the place bets up."

Now, it should not escape notice that a month earlier, on November 11, Soole also had advanced a defense—that she had not swiped out at shift's end on November 4—which turned out to be accurate, obliging Respondent to retract her discharge and to reinstate her. So, Soole's defense advanced on December 10 might logically have been accorded more than passing attention by, at least, Greco and Galle. Yet, testified Soole, Galle retorted "that this was not necessary because I was the only dealer that left the dealer place bets up."

Soole testified that she accused the officials present of wanting "to get rid of me" and of "accumulating as much as you can" toward that end. According to Soole, Greco responded, "Marla, I'm only the messenger. This has come down for *Argosy corporate*." (Emphasis added.) Soole further testified that Greco had said "that I was not allowed on any of the premises, be that the parking lot, the restaurant barge, the casino at all" for 1 year. Then she was again escorted to her locker, to pick up her personal belongings, and, from there, off of the premises.

In section I, above, I pointed out that Soole was not always a credible witness. However, she appeared to be testifying truthfully about what had been said during the December 10 termination meeting and certain other evidentiary aspects tend to corroborate her testimony about what had been said during it.

Most prominently, on the December 10 Record of Counseling, during the meeting, Soole wrote, "My Box person told me the bets stayed up. This had been done before by many other dealers." During direct examination, Greco claimed that, aside from having read the Record of Counseling to Soole, consistent with his "basic procedure," "I really don't remember" anything else that had been said during that meeting. True to form, however, he began adding to that initially advanced account during cross-examination. For, he then conceded that Soole had said the termination was "unfair," because "our box person told me the bets stayed up," and, in addition, that Soole had said that other dealers had been leaving up Sasse's winning toke place bets.

Yet, asked if Soole had named those other dealers, Greco answered, "I don't—that I don't recall, sir." After that, he claimed that he first learned the names of those people during the hearing and asserted finally, "I don't believe Marla did" enumerate the names of those other dealers and box people during the December 10 meeting. But, neither Sprague nor Holsinger, both present during the December 10 meeting and both witnesses for Respondent, corroborated that equivocal denial by Greco.

Even had Soole not named names during the December 10 meeting, however, as pointed out above her written and verbal explanation of the practice—that Sasse's winning toke bets were being left up by others—should have sufficed to alert Respondent's officials that the discharge decision might warrant another look. Seemingly, Holsinger, one of the two officials with authority to make such decisions, could have deferred Soole's termination, based upon the latter's assertion. After all, her November 11 denials had proven to be accurate. "Absolutely," conceded Galle, such an assertion should have raised red flags for Respondent's officials. Nevertheless, Soole's discharge was implemented on December 10.

Beyond that, Galle's testimony about the December 10 meeting was somewhat bizarre. He claimed that when Greco began the meeting by explaining "what she was in there for," Soole had denied "remembering [the December 5 Sasse incident] or said she didn't remember it," which led Greco to say to him (Galle), "Mike could you explain the situation or refresh her memory," after which, "I asked Marla if she didn't remember me coming to the floor and talking to Sherry Rich or standing behind the game of anything, and Marla said 'No," then, "I really can't remember. She recalled parts of it afterwards." That account by Galle—which appeared aimed at casting Soole in a duplicitous light, inasmuch as it really seems unlikely that she would have forgotten by December 10 an unusual event such as the one which occurred on December 5—was not corroborated by Greco. Nor was it corroborated by Holsinger or Sprague.

Galle initially answered that Greco "went over the Record of Counseling" and "additional stuff but I don't remember what was said"—a somewhat peculiar assertion by someone who claimed to have attended that meeting "[a]s a witness." Further, during direct examination Galle claimed "I don't recall" if Soole had identified or suggested that someone had told her that it was okay to leave up the winning toke bets—though Soole's above-quoted handwritten entries on the Record of Counseling show that she must have said, at least, that box person Raymond had allowed the winning toke bets to be left

up. Only during cross-examination did Galle admit that "[p]ossibly" Soole might have said that. Still, he remained equivocal. "She could have" named people who had left up Sasse's winning toke bets in the past, allowed Galle, but, "I'm not saying that she didn't. I'm not saying that she did."

Of perhaps greater import is Soole's testimony that Greco had said that the decision to fire her had "come down from Argosy corporate." Greco never denied having said that to Soole. Nor did Galle, Holsinger, or Sprague deny that Greco had done so. Such a remark contradicts the above-described assertions that Pavone and Holsinger, in consultation with counsel, had made the discharge decision. Instead, it reveals that the locus of the discharge decision had been elsewhere. And, so far as the evidence shows, Soole's December 10 discharge had been the only occasion when Argosy had stepped in to make a decision ordinarily made by Respondent's casino manager and/or director of human resources.

Soole's December 10 assertions to Respondent's officials, about the practice of leaving up Sasse's winning toke bets, did not pass totally unnoticed by them. In the end, however, their accounts about their reactions created even more grief for Respondent's legitimacy defense.

Galle pleaded, "I couldn't have done anything about" Soole's assertions, because surveillance tapes of events are only maintained for 7 days before being recycled. He denied specifically that anyone had asked him to look at tapes for, at least, December 3 and 4. But that denial contradicted, and was contradicted by, Pavone. The latter testified that, upon having heard that Soole had said others had been following the practice of leaving up Sasse's winning toke bets—in the process, conceding, contrary to Greco, that Soole had named specific personnel who had been doing that: "I believe that was the case"—he had "called Mike Galle in surveillance and I said 'Do you have any logs, and information, that we have caught other dealers leaving toke bets up,'" but, "Galle told me surveillance has nothing on record of anybody else doing it." Obviously, if Pavone is to be believed, someone had asked Galle to review what surveillance had on record.

Maybe it was Galle, not Pavone, who should be believed with regard to the foregoing discrepancy. Pavone testified that he also had contacted Director of Security Brown, asking "if he knew anything about toke bets being left up" and, also, asking Brown to "talk to" the State's Department of Criminal Investigation, because that agency "is our watchdog. DCI not only watches the employees but watches us, Gordie, everybody." Pavone further claimed that Brown "called me back and said that he could find nothing." Brown testified as a witness for Respondent. When he did so, however, he made no mention whatsoever of having been asked by Pavone about "toke bets being left up," nor about being asked to check with DCI. Nor did Brown testify about having called Pavone to report on any conversation with DCI-personnel about "toke bets being left up." In fact, Brown denied specifically that he had had any input into even the decision to bar Soole from Respondent's premises for a year.

Finally, Pavone testified that he had asked Greco to investigate whether Ebaugh had told employees to leave up winning toke bets and, later, that Greco reported, "I don't know of anybody else doing it." In fact, Greco did testify that he had inquired about whether supervisors had told dealers to leave up winning toke bets. But, he made no mention of having been asked to do so by Pavone, though he did testify that he had reported the results of his inquiries to "both" Pavone and Holsinger. Even so, there still were problems with Greco's testimony about his asserted inquiries of supervisors about toke bets.

Most significantly, Greco conceded that—in contrast to his November procedure when he had checked with dealer Rosenbaum and discovered that employees other than Soole were simultaneously signing in and out on logs—he had spoken to not a single dealer about whether Sasse's winning toke bets were being left up before December 5. Of course, by not doing so, there would be no means by which an employee could confirm Soole's assertions about the existence of such a practice. Instead, he confined his inquiries to supervisors. "I was very, very busy," he claimed. Yet, it is difficult to understand his failure to make inquiry of even a single employee, if his general manager had been the one who truly had asked Greco to conduct an investigation. In response to such a request, surely even a sometimes neglectful manager—and there is no evidence that Greco was such a manager—would have made at least some inquiry of employees, as was done during November when Rosenbaum was questioned.

At one point, Greco did claim that "I asked some box people." Yet, he identified only Marilyn Raymond. She never corroborated Greco's assertion about his having questioned her about the existence of such a practice. In any event, she obviously would have no knowledge of such a practice—it had been Soole who had told Raymond on December 5 that such a practice did exist when Sasse was playing. To be sure, Greco had spoken to Raymond about the subject. But, that occurred on December 10 when he suspended her. That can hardly be characterized as an inquiry. In the end, moreover, Greco's testimony about inquiry which he had made of "some box people" was contradicted by his own testimony elsewhere that he had asked only shift managers and floor supervisors about whether there had been such a practice. Greco testified—unsure-prisingly, given the existence of a rule prohibiting leaving up winning toke bets and the consequences visited upon Soole, ostensibly for having violated that rule—that all supervisors denied having authorized or known about the practice with Sasse.

Yet, it is significant that, while he testified that he had never authorized a practice such as that described by Soole and other dealers, Ebaugh never testified that he had been questioned by Greco about having authorized dealers to leave up Sasse's winning toke bets. In fact, no shift manager or floor supervisor corroborated Greco's testimony about having inquired of them about authorizing such a practice. Rich, for example, testified only about having spoken with Galle.

Further unreliability for Respondent's defense arose as a result of Pavone's testimony about his decision to again impose a one-year bar to Soole's presence on the premises. In the course of describing that decision, Pavone testified, "At this point I said it's one year *until we find out what happened* and that's the reason for one year." (Emphasis added.) He tried to portray that "find out what happened" assertion to a supposed concern that there "could have been collusion and/or fraud with a pa-

tron." However, Respondent presented no evidence that any investigation of such a possibility had ever been conducted, either before or after Soole's December 10 termination. Beyond that, reminiscent of what had occurred during November, Pavone never explained what had led him to select 1 year as the December 10 bar's duration.

The factors reviewed in preceding sections and subsections, particularly those relating specifically to Soole, establish that Respondent's motivation for firing and barring Soole on December 10 had been retaliation against her for continuing to be involved with Sturgeon and deterrence of other employees from becoming or remaining involved with Workers Have Rights Too. More specifically, the evidence shows that, reminiscent of what had occurred before November 11, Respondent seized upon an event, Soole's initial participation in a practice which Respondent must have known was being followed by dealers, then, advanced her one-time participation in that practice as a violation of the rule against leaving up winning toke bets.

Respondent's own evidence about close scrutiny of Sasse's play, in conjunction with the testimony of Sasse and of Soole and other dealers, undermine completely any claim that Respondent had not known that Sasse's winning toke place bets were not being left up before December 5. Respondent was further alerted to the existence of such a practice by Soole on December 10, but made no meaningful effort to make inquiry about that practice, thereby avoiding the result of its November inquiry of Rosenbaum—when she denied having used Soole's badge to swipe out the latter and, in essence, confirmed Soole's eventual assertion about the practice of logging in and out at the same times. With respect to the December 10 termination, Respondent did nothing to provide any employee-testimony, such as Rosenbaum's, that it had known before or after that date about the practice of leaving up Sasse's winning toke bets.

Beyond that, Argosy's involvement in a discharge decision, so far as the record discloses, had been unique; there is no evidence of Argosy having injected itself into any other decision involving discharge of one of Respondent's employees. And, as Holsinger conceded when explaining the decision to fire Soole while only suspending Raymond, Soole would not have been terminated on December 10 but for the existence of earlier unlawful suspensions of her. Viewed in its totality, therefore, the credible evidence does not support a defense of legitimacy for Soole's discharge and 1-year bar, but rather establishes that that discharge and bar violated Section 8(a)(1) of the Act.

Turning to consideration of Raymond's December 10 suspension, as box person on December 5 she had been responsible for what had occurred during the craps game while Sasse's winning toke place bets were being left up by Soole. Indeed, she admitted having allowed those bets to remain up, in reliance upon what Soole had said to her. By December Respondent knew that an unfair labor practice charge had been filed against it on, inter alia, Soole's behalf and, accordingly could fairly conclude that her December 10 discharge would become a subject of the investigation conducted as a result of that charge. Respondent's officials appeared perceptive enough to realize that its asserted legitimate motivation for that discharge would be diminished, perhaps undermined, if Raymond, also, were not disciplined.

Had Soole not been unlawfully disciplined, then Raymond would not have been suspended. That suspension was an integral part of the unfair labor practice directed at Soole and, therefore, it also violated Section 8(a)(1) of the Act.

With regard to the allegations that Soole's discharge and 1-year bar also violated Section 8(a)(4) of the Act, there really is no evidence that the existence of the charge, save to the extent that it further evidence Soole's continued relations with Sturgeon and Workers Have Rights Too, motivated Respondent's decision to fire and bar Soole on December 10. To the contrary, as concluded in subsection D, above, Respondent had already seized upon an event and unlawfully terminated Soole because of her involvement with Sturgeon and his organization. That had occurred prior to the time that the charge had been filed. Thus, there is evidence of a disposition to be rid of Soole, occurring even before the charge had been filed. There is no evidence that the filing of the charge somehow independently motivated Respondent to terminated Soole on December 10. Therefore, I shall dismiss the allegation that Soole's second discharge and bar violated Section 8(a)(4) of the Act.

In contrast, Raymond's suspension presents a different situation. As pointed out above, by December 10 Respondent could fairly have anticipated that the General Counsel would be investigating the termination and bar of Soole on that day. Both in her written remarks on her Record of Counseling and verbally, Soole had pointed out that Raymond, as box person, had agreed to allow Sasse's bets to remain up. Though there is no evidence that the charge had motivated the decision to discharge and bar Soole, as concluded above, the circumstances set forth above are strong indicia of motivation to shore up the legitimacy of Respondent's defense to investigation of those unfair labor practices directed against Soole.

Those indicia are buttressed by another one. Some of Respondent's earlier unlawful personnel actions—the written warnings issued to Case on September 9 and the "infraction" attributed to Soole in the November 12 Record of Counseling—were based upon incidents which had involved more than one employee. Case's asserted "disparaging remarks to . . . Marshall" had been similar to ones made to Marshall by, at least, Gantz; only Case received a Record of Counseling concerning those remarks. Case's asserted "disparaging remarks" about Farley's employment departure had been made to other employees who also were celebrating that departure; only Case was issued a Record of Counseling. Respondent knew by November 12 that employees other than Soole had been signing in and out simultaneously; only Soole was issued a Record of Counseling recording that "infraction." In other words, prior to the filing of the charge, Respondent took only the action needed to retaliate against an employee involved with Workers Have Rights Too.

After the charge had been filed, as discussed above, Respondent had to be aware of the need to protect its position: if Soole's discharge and bar were to be defended adequately, then discipline would be necessary for Raymond, especially as Soole was pointing specifically to Raymond's agreement to leave up Sasse's winning toke place bets. Thus, a preponderance of the evidence supports the allegation that Raymond's suspension violated Section 8(a)(4), as well as Section 8(a)(1) of the Act.

CONCLUSION OF LAW

Belle of Sioux City, L.P. has committed unfair labor practices affecting commerce by suspending Marilyn Raymond on December 10, 1997, to fortify its position during investigation of an unfair labor practice charge involving discipline of another employee and to conceal the unlawful reasons for that other employee's discipline, in violation of Section 8(a)(4) and (1) of the Act; and, by coercively interrogating employees about the identities of employees discussing employment terms and conditions among themselves and the reasons those employees were making remarks about those terms and conditions of employment, by threatening employees with possible discharge for discussing their belief that an employee had been unfairly treated under existing employment terms and conditions, by imposing two written warnings on Michelle Case in Records of Counseling issued on September 9, 1997, by imposing two 3-day suspensions on Marla Soole in Records of Counseling issued on September 24 and on November 4, 1997, and by twice discharging and twice barring from its premises for 1 year Marla Soole in Records of Counseling issued on November 11 and on December 10, 1997, in violation of Section 8(a)(1) of the Act. However, it has not violated the Act in any other manner alleged in the complaint as amended.

REMEDY

Having concluded that Belle of Sioux City, L.P. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Marla Soole full reinstatement to the position of dealer from which she was unlawfully discharge on December 10, 1997, dismissing, if necessary, anyone who may have been hired or assigned to perform her job after that unlawful discharge. If Soole's job no longer exists, she will be offered employment in a substantially equivalent position, without prejudice to her seniority or other rights and privileges which she would have enjoyed had she not been unlawfully discharged.

It also shall be ordered to make whole Marla Soole for any loss of earnings and other benefits she suffered as a result of her unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings. *F. W. Woolworth Co.*, 90 NLRB 289 (1950). In addition, it shall be ordered to make whole Soole for any loss of earnings and other benefits she suffered as a result of the unlawful 3-day suspensions imposed on her from September 24 through 26 and from November 4 through 6, 1997, and to make whole Marilyn Raymond for any loss of earnings and other benefits she suffered as a result of the unlawful 3-day suspension imposed on her on December 10, 1997. Interest is to be paid on all amounts owning, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It also shall, within 14 days from the date of this Order, remove from its files the Records of Counseling issued to Michelle Case on September 9, 1997; to Marla Soole on September 24, on November 4, 11, and 12, and on December 10, 1997; and to Marilyn Raymond on December 10, 1997, and, in addition, remove from its files any references to the unlawful written warnings issued to Case on September 9, 1997, to the unlawful 3-day suspensions imposed on Soole on September 24 and November 4, 1997, to the unlawful discharges of Soole on November 11 and December 10, 1997, as well as to the "infraction" attributed to her on November 12, 1997, and to the unlawful 3-day suspension imposed on Marilyn Raymond on December 10, 1997. Within 3 days thereafter, it shall notify each of them in writing that this has been done and that those written warnings, suspensions, "infraction," and discharges shall not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Belle of Sioux City, L.P., Sioux City, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing Records of Counseling to, and suspending Marilyn Raymond or any other employee to fortify its position during investigation of an unfair labor practices charge involving discipline of another employee and to conceal the unlawful reasons for having disciplined that other employee.

(b) Interrogating employees about the identities of employees with whom they are communicating about employment terms and conditions and about their reasons for saying what they have said to other employees about terms and conditions of employment; threatening employees with possible discharge for communicating among themselves about employment terms and conditions; issuing written warnings to Michelle Case or to any other employee for engaging in communications with other employees about employment terms and conditions; suspending, discharging, or barring from its premises Marla Soole or any other employee because they have engaged in communications with other employees about employment terms and conditions, and have sought to improve employment terms and conditions with which they are dissatisfied.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marla Soole full reinstatement to the position of dealer from which she was unlawfully discharged on December 10, 1997, or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges which she would have enjoyed had she not been unlawfully discharged.

(b) Make whole Marla Soole for any loss of earning and other benefits suffered as a result of her unlawful discharge on December 10, 1997 and, also, as a result of her unlawful 3-day

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

suspensions imposed on September 24 and on November 4, 1997, and, in addition, make whole Marilyn Raymond for any loss of earnings and other benefits suffered as a result of her unlawful 3-day suspension imposed on December 10, 1997, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files the Records of Counseling issued to Michelle Case on September 9, 1997, to Marilyn Raymond on December 10, 1997, and to Marla Soole on September 24, on November 4, on November 11 and 12, and on December 10, 1997, and, in addition, remove from its files any references to the unlawful written warnings issued to Case on September 9, 1997, to the unlawful three-day suspensions imposed on Soole on September 24 and on November 4, 1997, and imposed on Raymond on December 10, 1997, to the "infraction" charged to Soole on November 12, 1997, and to the discharges and bars from its premises of Soole on November 11 and on December 10, 1997, and within 3 days thereafter notify Case, Soole, and Raymond in writing that this has been done and that those adverse personnel actions will not be used against any of them in any way.

(e) Within 14 days after service by the Region, post at its Sioux City, Iowa facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Belle of Sioux City, L.P. and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Belle of Sioux City, L.P. has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at that facility at any time since September 4, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about the identities of other employees with whom you talk about employment terms and conditions, nor about your reasons for what you say to other employees about employment terms and conditions.

WE WILL NOT threaten you with possible discharge for communicating with other employees about employment terms and conditions.

WE WILL NOT issue written warnings to Michelle Case or any other employee, suspend, discharge, or bar from our premises Marla Soole or any other employee, nor take any other disciplinary actions which interfere with, restrain, or coerce Case, Soole, or any other employee in the exercise of rights protected by the National Labor Relations Act.

WE WILL NOT suspend Marilyn Raymond or any other employees to fortify our position during investigation of an unfair labor practice charge involving discipline of another employee and to conceal the unlawful reasons for discipline of that other employee.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, within 14 days from the date of the Order, offer Marla Soole full reinstatement to the position of dealer from which she was discharged on December 10, 1997, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges which she would have enjoyed had we not unlawfully discharged her.

WE WILL make whole Marla Soole for any loss of earnings and other benefits resulting from our unlawful discharge of her on December 10, 1997, and resulting from our unlawful suspensions of Soole on September 24 and on November 4, 1997, and WE WILL make whole Marilyn Raymond for any loss of earnings and other benefits resulting from our unlawful suspension of her on December 10, 1997, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Order, remove from our files the Records of Counseling issued to Michelle Case on September 9, 1997, to Marla Soole on September 24, on November 4, on November 11 and 12, and on December 10, 1997, and to Marilyn Raymond on December 10, 1997 and, in addition, remove from our files any references to the written warnings issued to Case on September 9, 1997, to the suspensions of Soole on September 24 and on November 4, 1997, to the "infraction" charged to Soole on November 12,

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

1997, to the discharges and bars from our premises of Soole on November 11 and on December 10, 1997, and to the suspension of Raymond on December 10, 1997, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that those unlawful actions will not be used against any of them in any way.

BELLE OF SIOUX CITY, L.P.